

## EXHIBIT A

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CATHERINE PHILLIPS, Staff Representative  
Michigan AFSCME Council 25, and Chief Negotiator  
with the City of Detroit; JOSEPH VALENTI, Co-  
Chief Negotiator with the Coalition of Unions of the  
City of Detroit; MICHIGAN AFSCME COUNCIL  
25; RUSS BELLANT, President of the Detroit  
Library Commission; TAWANNA SIMPSON,  
LAMAR LEMMONS, ELENA HERRADA, Detroit  
Public School Board Members; DONALD  
WATKINS AND KERMIT WILLIAMS, Pontiac City  
Council Members; DUANE SEATS, DENNIS  
KNOWLES, JUANITA HENRY AND MARY  
ALICE ADAMS, Benton Harbor Commissioners;  
WILLIAM "SCOTT" KINCAID, Flint City Council  
President; BISHOP BERNADEL JEFFERSON;  
PAUL JORDAN; REV. JIM HOLLEY, National  
Board Member, Rainbow Push Coalition; REV.  
CHARLES E. WILLIAMS II, Michigan Chairman,  
National Action Network; REV. DR. MICHAEL A.  
OWENS, REV. LAWRENCE GLASS, REV. DR.  
DEEDEE COLEMAN, BISHOP ALLYSON  
ABRAMS, Executive Board, Council of Baptist  
Pastors of Detroit and Vicinity,

Plaintiffs,

v

RICHARD D. SNYDER, as Governor of the State of  
Michigan, and ANDREW DILLON, as the Treasurer  
of the State of Michigan, acting in their individual  
and/or official capacities,

Defendants.

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No. 2:13-cv-11370

HON. GEORGE CARAM STEEH

MAG. R. STEVEN WHALEN

**DEFENDANTS' MOTION TO  
DISMISS UNDER FED. R. CIV. P.  
12(B)(1) & (6) AND BRIEF IN  
SUPPORT**

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## DEFENDANTS' MOTION TO DISMISS

Defendants Richard D. Snyder, Governor of the State of Michigan, and Andrew Dillon, Treasurer of the State of Michigan, move to dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief for the following reasons:

1. Plaintiffs lack standing to bring any of their claims.
2. 2012 Mich. Pub. Acts 436, Mich. Comp. Laws § 141.1541 *et seq.* (P.A. 436), does not violate the Due Process Clause or U.S. Const. art. IV, § 4 (Counts 1, 2, 3).

3. P.A. 436 does not violate the Equal Protection Clause (Counts 4, 5, 6, 11).
4. P.A. 436 does not violate Section 2 of the Voting Rights Act (Count 7).
5. P.A. 436 does not violate First Amendment free speech and petition rights (Count 8).
6. The City of Detroit emergency manager appointment of Kevin Orr does not violate the First Amendment right to petition (Count 9).
7. And P.A. 436 does not violate the Thirteenth Amendment (Count 10).
8. Defendants sought concurrence from Plaintiffs' counsel but concurrence was not given.
9. Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed if no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. *Ludwig v. Bd of Trustees*, 123 F.3d 404, 408 (6th Cir. 1997). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not facially plausible. *Id.* at 678 (citing *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).
10. Fed. R. Civ. P. 12(b)(1) allows dismissal for lack of subject-matter jurisdiction. It is a plaintiffs' burden to prove jurisdiction. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

Applying the standard of review set out in paragraphs 9 and 10 to each argument in the brief, and for the reasons stated in this motion, Plaintiffs' Complaint fails as a matter of law. Defendants respectfully request that this Court dismiss Plaintiffs' Complaint in its entirety and with prejudice.

Respectfully submitted,

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Dated: May 15, 2013

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
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**BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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## CONCISE STATEMENT OF ISSUES PRESENTED

1. Should all counts be dismissed under 12(b)(1) because Plaintiffs lack standing?
2. Should the entire Complaint be dismissed under Fed. R. Civ. P. 12(b)(6) because Plaintiffs have failed to state a claim for which relief may be granted under any asserted cause of action?

## CONTROLLING OR MOST APPROPRIATE AUTHORITY

### Authority:

*ACLU of Ohio Found., Inc., v. Ashbrook*  
*Canfora v. Old*  
*City of Cleburne v. Cleburne Living Center, Inc.*  
*Ctr. For Bio-Ethical Reform, Inc. v. Napolitano*  
*FCC v. Beach Commc'ns, Inc.*  
*Holt v. City of Tuscaloosa*  
*Home Building & Loan Ass'n v. Blaisdell*  
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*Morgan v. Rhodes*  
*Roth v. Bd. of Regents*  
*Rodriguez v. Popular Democratic Party*  
*Smith v. Arkansas State Highway Employees, Local 1315*  
*TriHealth, Inc. v. Board of Comm'rs, Hamilton County, Ohio*  
*Village of Arlington Heights v. Metro. Housing Dev. Corp.*  
*Washington v. Glucksberg*

## INTRODUCTION

The concept of an emergency manager is not new to Michigan. Indeed, both major political parties have used such managers to solve local economic difficulties for over 20 years. But in an economic environment where a disturbingly high number of local governments and school districts are teetering on the brink of financial catastrophe, more flexibility and new tools were required. The Michigan Legislature responded with 2012 Public Act 436 (P.A. 436), which replaces Michigan's previous emergency-manager law, P.A. 72.

Having lost the political battle to stop P.A. 436 on the steps of the Lansing Capitol, Plaintiffs filed this lawsuit, an action that contains no cognizable legal claims or alternative solutions to the financial problems that have plagued many communities. Because Plaintiffs' proper remedy is the political process, not the courts, the Complaint should be dismissed in its entirety.

## STATEMENT OF FACTS

### Nature of the Case

Plaintiffs bring this action under 42 U.S.C. § 1983, alleging that P.A. 436 violates the U.S. Const. art. IV, § 4 (Republican Form of Government); the First Amendment (freedom of speech and the right to petition government); the Thirteenth Amendment (vestiges of slavery); the Fourteenth Amendment (due process and equal protection); and the Voting Rights Act, 42 U.S.C. § 1973, *et seq.* (R. 1, Compl., ID# 2.) Where specific factual allegations are necessary for deciding this motion, those facts have been taken from the Complaint. Although Plaintiffs allege both facial and as-applied challenges, they make no specific applications of P.A. 436 to any factual occurrence in any paragraph of the Complaint. (*Id.* at, ¶¶ 122, 128, 138, 139, 151, 152, 167, 168, 182, 183, 194, 195, 206, 207, 208, 220, 229, 230 and 243, ID## 25-28, 30-31, 33-

34, 36-37, 39-40, 42, 44, 46-47, 49.) Thus, this is only a facial challenge to the constitutionality of the Act. And their allegations focus exclusively on the Act's emergency-manager component.

### **Michigan's Emergency Financial Manager Acts**

The Legislature enacted P.A. 436 in December 2012, effective March 28, 2013. P.A. 436 followed the period of time from August 6, 2012 to March 28, 2013, when the State and its political subdivisions operated under 1990 Mich. Pub. Acts 72 (P.A. 72), Mich. Comp. Laws § 141.1201, *et seq.* which, for purposes of this brief, will be referred to as the original act allowing the appointment of emergency managers. P.A. 72 was the operative statute because of the referendum and rejection of the earlier fiscal responsibility legislation, 2011 Mich. Pub. Acts 4 (P.A. 4).<sup>1</sup> Under P.A. 72, emergency managers had fewer powers than they previously possessed under P.A. 4, which contained more tools and authority to rectify financial emergencies in distressed local communities and school districts.

In December 2012, the Legislature passed P.A. 436—*not* to reenact P.A. 4, previously rejected by voters but to replace P.A. 72, which was in effect at the time. The Legislature reasonably determined that local fiscal stability is necessary for the State's health, welfare, and safety, and thus, P.A. 436 was necessary to protect those interests as well as the credit ratings of the State and its political subdivisions. Mich. Comp. Laws § 141.1543.

### **Key Features of P.A. 436**

Unlike earlier laws, P.A. 436 includes two key features: expanded local government options—chosen by the local government—to address the financial emergency; a time limit for a financial manager's appointment; and, authority to petition for removal of a financial manager. Mich. Comp. Laws §§ 141.1547, 1549(2), 1549(11). The statute also builds in checks on an

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<sup>1</sup> See OAG, 2011-2012, No 7267, p 6 (August 6, 2012), available at <http://www.ag.state.mi.us/opinion/datafiles/2010s/op10346.htm>.

emergency manager's authority. See, e.g., Mich. Comp. Laws §§ 141.1552(1)(k) & (u) (collective bargaining agreements and borrowing money), 1552(4) (selling or transferring public utilities), 1555(1) (selling of assets), 1559(1) (proposed contracts, sales, and leases).

## ARGUMENT

### I. Plaintiffs lack standing to bring any of their counts.

This Court should dismiss all counts of Plaintiffs' Complaint for lack of standing. To invoke the subject matter jurisdiction of an Article III federal court, individual plaintiffs must establish, among other things, an injury-in-fact that is concrete and particularized, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because injunctive and declaratory relief is sought, these Plaintiffs also have the heightened burden of showing a substantial likelihood they will be injured in the future. *City of Los Angeles, v. Lyons*, 461 U.S. 95, 105 (1983). The Organizational Plaintiffs have standing only if (a) their members otherwise have standing to sue in their own right; (b) the interests to be protected are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit. *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 489 (6th Cir. 2004). None of these requirements are met here.

#### A. Individual, Non-Elected Plaintiffs Bellant, Jefferson, Jordan, Holley, Williams, Owens, Glass, Coleman, and Abrams lack standing to bring Counts 2-8 and 10-11.

This group of Plaintiffs are residents of localities with emergency managers. (R. 1, Compl., at ¶10, ¶¶ 21-28, ID## 5, 6-7.) Yet, they do not allege that Defendants' actions have injured them in a manner distinguishable from the harm incurred by any resident of any locality with an emergency manager.

Rather, these Plaintiffs raise only general grievances regarding Defendants' policy choices related to fiscally distressed local governments. Their claims are strikingly similar to

**B. Individual, Elected Plaintiffs Simpson, Lemmons, Herrada, Watkins, Williams, Seats, Knowles, Henry, Adams, and Kincaid lack standing to bring Counts 2–8 and 10–11.**

### C. Individual Union Negotiator-Plaintiffs Phillips and Valenti lack standing.

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Indeed, the facts related to the Count I allegations were the basis for an earlier action by Valenti and Council 25 against the City of Detroit, Governor Snyder and Treasurer Dillon. See, *Valenti, et. al. v. Snyder, et. al.*, USDC-ED No. 12-11461, R. 6, Amended Complaint. The coalition of unions, for which Valenti was a negotiator and which included Council 25, had negotiated tentative employee concessions with the City of Detroit. But these terms were never ratified by the City Council and never became effective. Detroit Charter, §6.408. The City's duty to collectively bargain was suspended effective April 4, 2012 with the approval of a consent agreement—the Financial Security Agreement—negotiated with the State under P.A. 4. Thus, the allegations here do not establish any particularized injury to Phillips or Valenti.

**D. Council 25 lacks organizational standing to bring any claims.**

In sum, Plaintiffs collectively lack standing to bring Counts 1 - 11. Accordingly, this Court should dismiss these Counts with prejudice under Fed. R. Civ. P. 12(b)(1).

**II. P.A. 436 does not violate the Due Process Clause or U.S. Const. art. IV, § 4 (Counts 1, 2, 3).**

**A. No substantively protected right to collective bargaining is violated.**

To properly analyze Plaintiffs’ substantive due-process claim based on collective bargaining, this Court is required to carefully identify the fundamental right or liberty interest allegedly implicated. The substantive component of the Due Process Clause protects fundamental rights and liberty interests that are so “implicit in the concept of ordered liberty” that “neither liberty nor justice would exist if they were sacrificed.” *Palko v. Connecticut*, 302 U.S. 319, 326 (1937). Only when a state law infringes these fundamental rights and interests is it subject to strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

Those fundamental rights and interests accorded substantive protection under the Due Process Clause include matters related to marriage, family, procreation, bodily integrity, and directly related privacy interests. *Id.* at 720; *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998). The Supreme Court is reluctant to expand the concept of substantive due-process further “because guideposts for responsible decision making in this uncharted area are scarce and open-ended.” *Glucksberg*, 521 U.S. at 720 (quotation marks and citation omitted).

Here, Plaintiffs’ claim is not based on a right found within the Bill of Rights or identified by the Supreme Court as “implicit in the concept of ordered liberty” or among those narrowly drawn “liberty” and privacy interests accorded substantive protection. *Id.* at 721. It is premised on an alleged “property interest in their employment, in the terms of employment negotiated pursuant to contract, and in rights granted under state law. . . .” (R. 1, Compl., ¶ 109, ID# 23.) And while state law property interests may give rise to a procedurally protected interest, they do not create a *substantively* protected fundamental right or interest. *Glucksberg*, 521 U.S. at 720.

Their substantive claim fails because their alleged substantively protected liberty interest in employment relates only to a generalized right to choose one’s field of private employment—“the right of the individual . . . to engage in any of the common occupations of life”—not an expansive right of public employment or to collectively bargain for employment terms. *Roth v. Bd. of Regents*, 408 U.S. 564, 572 (1978); *Parate v. Isibor*, 868 F.2d 821, 831 (6th Cir. 1989).

Plaintiffs fail to allege any plausible substantive due-process right, any facts indicating Defendants interfered with a substantively protected interest, or that P.A. 436 facially violates substantive due process. This claim fails as a matter of law and fact and should be dismissed.

**B. No procedurally protected right to collective bargaining is violated.**

Analysis of Plaintiffs’ procedural due-process claim involves a dual inquiry: (1) whether a liberty or property interest exists that the State has interfered with; and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient—that is, provided at a meaningful time and in a meaningful manner. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Matthew v. Eldridge*, 424 U.S. 319, 333, 349 (1976).

But no protected right or interest invoking procedural due process protection is at issue. Plaintiffs’ procedural due-process claim is premised on an alleged “property interest in the terms of employment negotiated pursuant to contract, and in rights granted under state law.” Plaintiffs rely on Michigan’s Public Employment Relations Act (PERA) as creating this right. Mich. Comp Laws § 423.215(1). (R.1, Compl., ¶ 111, ID# 23). PERA provides, “A public employer shall bargain collectively with the representatives of its employees” and “may make and enter into collective bargaining agreements . . . .” *Id.* Yet, the Legislature has also imposed limitations on this duty to collectively bargain. Mich. Comp. Laws § 141.1567(3). See also P.A. 436 Enacting Clause 2; Mich. Comp. Laws §§ 423.215(8), 215(9).

The Michigan Legislature has the authority to define and modify the powers, duties and obligations of its local governments, which are derived from the State in the first instance. Mich. Const. 1963, art. VII, §§ 1-34; *Mack v. City of Detroit*, 467 Mich. 186, 194; 649 N.W.2d 47(2002); Michigan’s Home Rule City Act reiterates this principle—all local charters, resolutions and ordinances are subject to and shall not conflict with or contravene the State’s Constitution or laws. Mich. Comp. Laws. § 117.36.

State law confers a procedurally protected benefit, such as the claimed property interest here, only when it mandates specific action in a manner that constrains bureaucratic discretion. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 463 (1989). Here, no such limitations exist. First, while a public employer “shall bargain collectively,” it retains discretion: “*may* make and enter into collective bargaining agreements.” Mich. Comp. Laws § 423.215(1) (emphasis added). Second, PERA does not confer a “right to bargain” that infringes the exercise of power under P.A. 436. Finally, both PERA and P.A. 436 suspend the duty to collectively bargain when the local government is in receivership. Thus, there is no protected property interest to bargain the terms of public employment and no procedural due process violation.

**C. No substantive due-process right to elect officials who possess general legislative power is violated.**

The “right to vote” is not expressly enumerated in the federal constitution. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35, n. 78 (1973). Rather, the right to vote is an implicit “fundamental political right” that is “preservative of all rights.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Yet, the Supreme Court has repeatedly recognized that the Fourteenth Amendment does not protect this generalized “right to vote” but instead protects a citizen’s right to participate in elections on equal footing with other citizens in the jurisdiction. *Rodriguez v.*

*Popular Democratic Party*, 457 U.S. 1, 9-10 (1982); *San Antonio*, 411 U.S. at 35. This right to equal participation is protected by the Equal Protection Clause. *Rodriguez*, 457 U.S. at 9-10.

In this context, it is perhaps easiest to understand Plaintiffs' substantive due-process claim by first determining what it is *not* about. (R. 1, Compl., ¶¶ 127, 128, ID## 25, 26.) Plaintiffs do not claim a denial or impairment of their right to vote. Nor do they claim their vote is not being counted. Rather, their claim is premised on an undefined, unrecognized right to have the elected official continue to carry out the duties of office—here, legislative powers. No federal court has ever recognized such a right. *Rodriguez*, 457 U.S. at 9-10.

Dismissal of this claim is consistent with Supreme Court precedent expressing a reluctance to expand the concept of substantive due process, *Glucksberg*, 521 U.S. at 720, and determining that where a more explicit textual context than the generalized Due Process Clause exists within the federal constitution, it must guide the constitutional analysis. *Graham v. Connor*, 490 U.S. 386, 394-395 (1989). That Court has determined that the appropriate context is the Equal Protection Clause as applied to the right of equal participation in the voting process.

**D. U.S. Const., art. IV, § 4 is not violated.**

The United States Constitution guarantees that “every State in this Union a Republican form of government.” U.S. Const., art. IV, § 4. Generally, this guarantee does not extend to local units of government. Political subdivisions of a State have never “been considered as sovereign entities.” Rather, they are “traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.” *Sailors v. Bd. of Ed. of Kent County*, 387 U.S. 105, 107-108 (1967) (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)). Any recognition of a specific form of local government ignores the nature of this traditional relationship. While the Supreme Court has clarified that a state cannot manipulate its political subdivisions to defeat a federally

protected right, the consistent theme of these court decisions is not the form of local government but protection of the “right to vote” against “dilution or debasement.” *Sailors*, 387 U.S. at 108; *Hadley v. Jr. College Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 54-55 (1970).

Significantly, federal courts do not meddle in how States structure their local political subunits. Such political questions and a State’s authority to define and regulate its relationship with subordinate political units are generally not justiciable. *Baker v. Carr*, 369 U.S. 186, 208-226 (1962); *Morgan v. Rhodes*, 456 F.2d 608, 618-620 (6th Cir. 1972).

In the absence of any infringement on the Plaintiffs’ equal participation in the voting process, Michigan’s choice to address the significant issues arising from a local government’s financial distress and their temporary impact on the structure of that government do not violate any protected federal right within this Court’s purview. This claim fails as a matter of law.

### **III. P.A. 436 does not violate the Equal Protection Clause (Counts 4, 5, 6, 11).**

Counts 4, 5, 6, and 11 assert that P.A. 436 violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. These claims lack merit.

#### **A. P.A. 436 does not unconstitutionally burden Plaintiffs’ fundamental right to vote.**

The Equal Protection Clause states that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The clause prevents states from making distinctions that (1) burden a fundamental right; (2) target a suspect class; or (3) intentionally treat one individual differently from others similarly situated without any rational basis. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005).

Plaintiffs assert that P.A. 436 violates their fundamental right to vote protected by the Equal Protection Clause in two ways. First, they argue the Act “effectively revoke[s] the right to vote by stripping governing authority from local elected officials and transferring such authority

to one unelected emergency manager with no accountability to local citizens.” (R. 1, Compl., ¶ 148, ID# 29.) Second, they argue the Act “impermissibly dilutes citizen’s right to vote in local elections where emergency managers have been appointed” because the emergency managers become vested with all governing authority, leaving local elected officials with only conditional powers and “the entire state electorate participates in the selection of the local government in the affected municipalities and school districts, while in all other localities across the state, local residents alone directly vote for their elected officials.” (*Id.* at ¶¶ 149-150, ID# 29.)

**1. Plaintiffs are not similarly situated to people residing in communities that do not have an emergency manager.**

As a threshold matter, Plaintiffs must demonstrate they are similarly situated to the persons allegedly receiving more favorable treatment “in all material respects.” *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quotation marks omitted); *TriHealth, Inc. v. Board of Com’rs, Hamilton County, Ohio*, 430 F.3d 783, 790-791 (6th Cir. 2005). “Disparate treatment of persons is reasonably justified if they are dissimilar in some material respect.” *Id.* In determining whether individuals are “similarly situated,” a court should “not demand exact correlation, but should instead seek relevant similarity.” *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000) (citation omitted).

Here, Plaintiffs, who are residents of local units of government under the administration of an emergency manager (Detroit, Detroit Public School District, Benton Harbor, Pontiac, and Flint), allege they are being disparately treated as compared to residents of local units of government with no emergency manager. That is not true. Each of these named local units, whether under P.A. 72 or P.A. 4, underwent a rigorous review of their financial condition, as assessed against set criteria, and were determined to be in a financial emergency by the Governor



or other executive official. The serious financial problems facing these local units of government cannot be overstated and are laid bare within each letter confirming the financial emergencies.

Plaintiffs are not similarly situated to residents of local units of government that have not been declared to be in a financial emergency. The significant financial condition of their local unit of government is the whole reason an emergency manager was appointed. Thus, comparisons to residents of local units of government in better financial condition do not advance Plaintiffs' claims. Nor do Plaintiffs identify any specific local units of government whose financial conditions are the same as or are sufficiently similar to Plaintiffs' communities that were not placed under the administration of an emergency manager after financial review. As a result, Plaintiffs have failed to make the threshold "similarly situated" showing and their equal-protection claims necessarily fail. *TriHealth, Inc.*, 430 F.3d at 790.

## **2. Plaintiffs have not been denied their fundamental right to vote.**

The right to vote is a "fundamental" political right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966), and the Equal Protection Clause applies when a state either classifies voters in disparate ways, or places restrictions on the right to vote. *League of Women Voters v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008) (citing *Bush v. Gore*, 531 U.S. 98, 104 (2000)). The specific character of the state's action and the nature of the burden on voters will determine the applicable equal-protection standard. See *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004) ("The scrutiny test depends on the [regulation's] effect on [the plaintiff's] rights.").

If a plaintiff asserts only that a state treated the plaintiff differently than similarly situated voters, without a reciprocal burden on the fundamental right to vote, the rational basis standard of review should apply. *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-09 (1969) (applying rational basis to a state statute prohibiting plaintiffs' access to absentee ballots where no right-to-vote burden was shown); *Biener*, 361 F.3d at 214-15 (applying rational basis absent a



showing of an “infringement on the fundamental right to vote”). But when a State’s classification “severely” burdens the right to vote, strict scrutiny is appropriate. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Where the burden is somewhere in the middle, courts apply the “flexible standard” outlined in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick*. See *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 238 (6th Cir. 2011) (applying the balancing test in an equal-protection challenge to the counting of provisional ballots).

Here, there is no suspect class and P.A. 436 does not burden Plaintiffs’ right to vote. Residents in local units of government under an emergency manager’s administration retain all their rights to exercise the franchise and vote for the candidates of their choice, including candidates for local government, and to have those votes counted. While P.A. 436 may temporarily prohibit a local unit’s chief executive officer and governing body from exercising the powers of those offices during the receivership, Mich. Comp. Laws § 141.1549(2), it does not preclude residents from voting candidates into these offices, or the candidates from continuing to hold those offices during the receivership.

Plaintiffs’ complaint really is that the officials they have already elected into office are prohibited (at least temporarily) from exercising some or all of the powers and duties they were elected to do—in other words, that their candidates can no longer be effective. But this is not a recognized violation of the right to vote.

### **3. Plaintiffs’ fundamental right to vote has not been diluted.**

Plaintiffs’ claim of vote dilution is that the appointment of an emergency manager in and of itself dilutes Plaintiffs’ right to vote, and/or that the appointment of an emergency manager for a particular local unit of government by the Governor, who is elected by voters statewide, dilutes the right to vote of the local residents: “The vote of citizens for their local government in

affected localities is grossly diluted by the statewide participation of the electorate.” (R. 1, Compl., ¶ 150, ID# 30.) These arguments are likewise without merit.

“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds*, 377 U.S. at 555. A vote-dilution claim invokes the principle of “one person, one vote,” a requirement under the Fourteenth Amendment. See 16B CJS, Constitutional Law, § 1264 (explaining that each person’s vote must count the same as any other person’s); *see also Carlson v. Wiggins*, 675 F.3d 1134, 1139 (8th Cir. 2012).

P.A. 436 does not violate this requirement. As explained above, residents in local units of government under the administration of an emergency manager retain the same rights to vote for and elect candidates of their choosing, and their votes count the same as residents in other local units of government voting for their local officials. Again, Plaintiffs’ real complaint is that their elected candidates will, on a temporary basis, no longer be effective or as effective in their offices. But this “injury,” if it exists, does not stem from any recognized violation of the fundamental right to vote or the “one person, one vote” principle.

**B. P.A. 436 does not discriminate based on race.**

In Count 5, Plaintiffs vaguely assert that P.A. 436 discriminates based on race. They observe that the Equal Protection Clause “protects [sic] laws and the application of laws that invidiously discriminate between similarly situated individuals or between groups of persons in the exercise of fundamental rights.” (R. 1, Compl., ¶ 161, ID# 32.) They then assert that voting in local elections is a fundamental right and that P.A. 436’s provisions “effectively revoke the right to vote.” *Id.*, ¶ 162, ID# 32. In paragraphs 168 and 169, Plaintiffs allege that P.A. 436 “discriminate[s] in the appointment of an EM and revocation of the community’s right to vote for local officials based on the racial composition of that community” and that Defendants have

caused injury by exercising authority under the Act in “various municipalities comprising more than 53% of the State’s [African American] population.”

Initially, as noted above, Plaintiffs have failed to allege or show that they have been disparately treated compared to citizens of a different race in communities that are similarly situated financially to Plaintiffs’ communities. *TriHealth, Inc.*, 430 F.3d at 790. Thus, this race-based equal-protection claim fails.

In addition, P.A. 436 does not embody a racial classification. Neither does it say or imply that voters are to be treated differently on account of their race. The purpose of the Act—resolving financial emergencies within local units of government—encompasses any local unit of government in financial distress, regardless of the racial makeup of its population. As a result, P.A. 436 is facially neutral.

“Where facially neutral legislation is challenged on the grounds that it discriminates on the basis of race, the enactment will be [analyzed under] strict scrutiny only if the plaintiff can prove that it ‘was motivated by a racial purpose or object,’ or ‘is unexplainable on grounds other than race.’” *Moore v. Detroit School Reform Bd.*, 293 F.3d 352, 369 (6th Cir. 2002) (internal quotation marks and citations omitted). So “[p]roving that a law has a racially disparate impact, without more, is [] insufficient to establish a violation of either the Fourteenth or the Fifteenth Amendment.” *Id.* at 369, citing *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (rejecting disproportionate impact as constitutionally infirm).

The Supreme Court has identified five factors relevant to determining whether facially neutral state action was motivated by a racially discriminatory purpose: (1) the impact on particular racial groups, (2) the historical background of the challenged decision, especially if it reveals numerous actions being taken for discriminatory purposes, (3) the sequence of events that

preceded the action, (4) procedural or substantive departures from the government's normal procedural process, and (5) the legislative or administrative history. *Village of Arlington Heights*, 429 U.S. at 266–68; see also *Moore*, 293 F.3d at 369-370 (addressing these factors in a challenge against Michigan School Reform Act and finding no equal protection violation). To the extent Plaintiffs' allegations even plead these factors, none of the allegations reveal a racially discriminatory purpose on the part of the Michigan Legislature or the Governor in enacting and signing P.A. 436. As a result, Plaintiffs fail to state a claim under a racial discrimination theory.

**C. P.A. 436 does not discriminate based on wealth.**

In Count 6, Plaintiffs allege that P.A. 436 violates equal-protection principles by discriminating based on wealth. They assert that “[u]nder Public Act 436, all stated criteria for appointing an EM are based on a community’s wealth and by extension, the wealth of the persons who reside within a community.” (R. 1, Compl., ¶ 181, ID#36.) They further allege that P.A. 436 has been implemented “in various municipalities with disproportionately high poverty rates.” (*Id.*, ¶ 184, ID# 37.) Plaintiffs thus conclude that P.A. 436 violates equal protection “through provisions of the statute that unduly revoke citizen’s right to vote for local officials based on the wealth of their community and themselves . . . .” (*Id.*, ¶ 183, ID# 37.)

Once again, these claims fail because Plaintiffs have failed to allege or show they have been disparately treated compared to communities or residents that are similarly situated with respect to wealth (or poverty). *TriHealth, Inc.*, 430 F.3d at 790. And P.A. 436 does not discriminate against local units of government, let alone their residents, based on wealth (or poverty). It is the overall financial condition and prognosis of a local unit of government that will subject it to review and the possible appointment of an emergency manager under P.A. 436, not its wealth or lack thereof. For example, a “wealthy” community whose financial books are in order would not be subject to review under P.A. 436, but neither would a “poor” community

whose books are also in good order. P.A. 436 is directed at rectifying financial mismanagement, which can occur in local units of government of any size and any degree of wealth.

In any event, P.A. 436 does not unconstitutionally burden the right to vote. Thus, no fundamental right is at issue. Moreover, wealth-based classifications do not discriminate against a suspect class. *Jonson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (citing *Papasan v. Allain*, 478 U.S. 265, 283-84 (1986)). So P.A. 436 is subject to rational basis review, if any review applies at all. *Bredesen*, 624 F.3d at 746. To survive rational basis scrutiny, P.A. 436 need only be “rationally related to legitimate government interests[.]” *Doe v. Mich. Dep’t of State Police*, 490 F.3d 491, 501 (6th Cir. 2007) (internal quotation marks and citation omitted), and “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). “When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (internal citation omitted).

Michigan has a legitimate government interest in preventing or rectifying the insolvency of its political subdivisions. The insolvency of a local unit of government threatens the health, safety, and welfare of its residents. Mich. Comp. Laws §141.1543. It also threatens the interests of the citizens of this State as a whole because it is detrimental to the State’s overall economic condition and credit rating. *Id.* P.A. 436 thus survives rational basis review.

**D. P.A. 436 does not discriminate against local units of government with emergency managers appointed under P.A. 72 or P.A. 4.**

In Count 11, Plaintiffs assert that P.A. 436 “discriminates against cities and school districts where EFMs and EM[s] have been and are currently in place,” because those

communities will not benefit from a provision in P.A. 436 that permits local units of government to vote to remove emergency managers after 18 months. (R. 1, Compl., ¶¶ 240-242, ID## 48.) “The law discriminates against these municipalities requiring them to suffer an additional 18 months with an EM despite their having had such officials in place much longer than this time period.” (*Id.*, ¶ 242, ID# 48.)

The provision Plaintiffs refer to is Mich. Comp. Laws §141.1549(6)(c), which allows the emergency manager, by resolution, to be removed by a 2/3 vote of the governing body of the local government, and if the local unit has a strong mayor, with strong mayoral approval. Neither P.A. 72 nor P.A. 4 had such a provision. But P.A. 436, Mich. Comp. Laws §141.1549(10), provides that appointed emergency managers “shall be considered an emergency manager under this act [P.A. 436] and shall continue under this act to fulfill his or her powers and duties.” Thus, beginning March 28, 2013, P.A. 436’s effective date, all local units of government currently under the administration of an emergency manager are eligible to use this provision at the expiration of 18 months.

Plaintiffs argue that because their affected local units of government have already been under the administration of an emergency manager longer than 18 months, it is discriminatory to make these communities wait the additional 18 months to take advantage of this section. But again, as stated above, to prove an equal-protection claim Plaintiffs must demonstrate that they are being treated disparately as compared to similarly situated persons. *Ctr. for Bio-Ethical Reform, Inc.*, 648 F.3d at 379. Plaintiffs have not alleged or shown that they are similarly situated to persons in local units of government with emergency managers newly appointed under the P.A. 436 process. Moreover, there is no fundamental right involved, and Plaintiffs do

not allege discrimination against a suspect class. Again, the rational-basis standard applies to any review of this particular provision of P.A. 436. *Bredesen*, 624 F.3d at 746.

The rational-basis standard is met. The Legislature had a legitimate government interest in both setting a potential 18-month endpoint to a local unit of government's administration by an emergency manager and in not making this option immediately available to communities who have had emergency managers longer than 18 months. This is because neither P.A. 72 nor P.A. 4 had a similar time limit, and the financial plans put in place by these pre-existing emergency managers were not likely designed to resolve a financial crisis within 18 months. Thus, subjecting existing local units of government to the additional 18 months allows their emergency managers to modify or amend their plans in light of the new time limitation. Moreover, P.A. 436 expressly provides these local units of government with the interim alternative of petitioning the Governor to remove an emergency manager who has served *less* than 18 months under P.A. 72. Mich. Comp. Laws §141.1549(11). P.A. 436 survives rational basis review, and Plaintiffs have failed to state a claim for relief.

**IV. P.A. 436 does not violate the Voting Rights Act (Count 7).**

Count 7, an alleged violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, also fails to state a claim upon which relief may be granted. To state a claim for violation of Section 2, a minority group must demonstrate what are commonly referred to as the “*Gingles* factors”: (1) “that it is sufficiently large and geographically compact to constitute a majority in a single-member district;” (compactness); (2) “that it is politically cohesive” (cohesiveness); and (3) that “the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority’s preferred candidate” (white-bloc voting). *Mallory v. Ohio*, 173 F.3d 377, 381-382 (6th Cir. 1999) (internal citations omitted).

First, Plaintiffs’ claims should be dismissed because they have not alleged that they constitute a “minority group” capable of bringing a Section 2 claim. *Id.* Second, Plaintiffs’ vote-dilution claim—predicated on the purported “statewide participation of the electorate” in their local governance—does not implicate any of the *Gingles* factors. (R. 1, Compl., ¶ 193, ID# 39.) Indeed, their Complaint is devoid of *any* allegations related to compactness, cohesiveness, or white-bloc voting. Instead, it focuses exclusively on their disagreement with Defendants’ policy choice in enacting P.A. 436. Yet, the Sixth Circuit has specifically recognized that regardless of the mechanism alleged to cause vote dilution, the *Gingles* factors *must* be satisfied *Mallory*, 173 F.3d at 386. Accordingly, this Court should dismiss Count 7.

**V. P.A. 436 does not violate the First Amendment rights of free speech and petition (Count 8).**

Count 8 is brought only by individual Plaintiffs, not by Council 25. (R. 1, Compl., ¶¶ 202-203, ID# 41.) The bases for this claim is that P.A. 436 strips the local officials of all authority, mirrors P.A. 4, which was rejected by voter referendum, and improperly vests P.A. 436 powers in previously appointed emergency financial managers. (*Id.* at ¶ 206-207, ID# 42.)<sup>2</sup>

These claims fail for two reasons. First, P.A. 436 neither abridges Plaintiffs’ speech nor prohibits them from petitioning their government for the redress of grievances. They can still vote and continue to voice their concerns to their elected officials. Second, even if this Court were to determine that an emergency manager abridges these First Amendment rights, the Act is still constitutional because the abridgement is content-neutral and justified by the financial exigencies of the local governments to which it is applicable.

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<sup>2</sup> Plaintiffs frame their First Amendment claim in part based on “speech on matters of public concern.” But the “public concern” balancing test set out by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), is applicable where an public employee is being disciplined, or subjected to an adverse employment decision, for his or her speech or associations. See *Piscottano v. Town of Somers*, 396 F. Supp. 2d 187, 200 (D. Conn., 2005) (citation omitted).



**A. P.A. 436 does not abridge speech or prohibit Plaintiffs from petitioning the Government.**

The First Amendment provides in part that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.” U.S. Const., amend. I. Freedom of speech, though a fundamental right, is not absolute. *Konigsberg v State Bar of California*, 366 U.S. 36, 49 (1961). The right to petition and the right to free speech are separate guarantees, yet they are related and generally subject to the same constitutional analysis. *Thaddeus-X v. Blatter*, 175 F.3d 378, 390 (6th Cir. 1999)

A threshold issue in any First Amendment analysis is whether there has been an abridgement of First Amendment rights. Here, for four reasons, Plaintiffs’ claims fail at the onset because there is no abridgement of free speech or petition rights.

**1. P.A. 436 gives local officials both voice and choice.**

An emergency manager is not simply thrust on local elected officials. Even before a preliminary review is conducted, the local governmental unit is notified and has an opportunity to provide comments to the state financial authority. Mich. Comp. Laws § 141.1544(2). Once the local unit is under review, it then has an opportunity to provide information concerning its financial condition. *Id.* at § 1545(2). If after review it is determined that a financial emergency exists, the local unit may appeal this determination. *Id.* at § 1546(3). Once the financial emergency is confirmed, the local government has options, including a consent agreement, an emergency manager, a neutral evaluation process option, or bankruptcy. *Id.* at § 1547(1)(a)-(d). Thus, an emergency manager is but one of the choices available to a local unit. Additionally, the process is only an interim one: an emergency manager may, by resolution, be removed after 18 months, or earlier if financial conditions are corrected. *Id.* at § 1549(6)(c), (7), (11).

**2. Plaintiffs have no constitutional right to local self-government and an emergency manager is accountable to the State's elected officials.**

“Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to *meet changing urban conditions.*” *Holt Civil Club v. City of Tuscaloosa*, 439 U.S. 60, 74-75 (1978) (quoting *Sailors*, 387 U.S. at 110-111 (emphasis added)). Moreover, “[m]unicipal corporations are political subdivisions of the [s]tate, created as convenient agencies for exercising such of the governmental powers of the [s]tate as may be entrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the [s]tate.” *Hunter*, 207 U.S. at 178-179 (1907).

Accordingly, a state may take action including destroying the municipal corporation entirely, “conditionally or unconditionally, with or without the consent of the citizens, or even against their protest,” and may do so “unrestrained by any provision of the Constitution of the United States.” *Id.* Thus, the U.S. Supreme Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), upheld an act authorizing city consolidation and providing for temporary government and payment of the consolidated city’s debts.

Although the Supreme Court has placed limitations on this expansive power—none of which apply here<sup>3</sup>—*Hunter* remains good law. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) (citing *Hunter* and affirming that “ultimate control of every state-created

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<sup>3</sup> Neither states nor their political subdivisions may draw boundaries that discriminate on an invidious basis, such as race or sex. *See Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) Also, equal protection prohibits states from restricting or diluting votes in violation of the “one person, one vote” principle announced in *Reynolds v. Sims*, 377 U.S. 533 (1964), and extended to local governments in *Avery v. Midland County*, 390 U.S. 474 (1968). Too, unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969). But, as argued above, Plaintiffs have no valid equal protection or Voting Rights Act claims.

entity resides with the State ... [and p]olitical subdivisions exist solely at the whim and behest of their State”) (internal quotation marks omitted); *Kelley v. Metropolitan County Bd. of Educ. of Nashville & Davidson County, Tenn.*, 836 F.2d 986, 994 (6th Cir. 1987).

Moreover, a State’s broad authority does not leave citizens without a voice or petition rights in local government affairs. In *Holt Civil Club v. City of Tuscaloosa*, 439 U.S. at 73-74, a case upholding Alabama’s decision to allow cities to exercise extraterritorial jurisdiction over nearby settlements, the Court recognized that it did not “sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible.” Instead, the “[a]uthority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body.” *Id.* (emphasis added, citation omitted).

The same is true here. As was true in *Holt Civil Club*, it is not for this Court to second-guess whether P.A. 436 is the most practical solution. And as in *Holt Civic Club*, Michigan must continue to respond to evolving economic challenges and in doing so has broad authority over local units of government. Plaintiffs are free to urge their proposals to their state elected officials—even where an emergency manager has temporarily limited the powers of their local officials. And they *still* get to vote, *still* get to voice their views about how local government is run, and *still* can seek to replace officials with whom they are dissatisfied.

Significantly too, while the local unit of government is in receivership, emergency managers are accountable to the State’s *elected* officials—who, in turn, are accountable to Plaintiffs and other voters. At the six-month mark and each three months thereafter, the emergency manager must submit an accounting of expenditures, contracts, loans, new or eliminated positions, and his or her financial and operating plan to the Governor, the state treasurer, various legislative representatives of the local government, and the clerk of the local

government. Mich. Comp Laws § 141.1557 (a)-(h). The Governor ultimately determines whether the financial emergency has been rectified, *id.* at § 1562(2), and has the power to appoint a new emergency manager, *id.* at § 141.1564.

In sum, how local government is organized is up to the State. And the way to change state law is through the political process, not the courts.

### **3. The Petition Clause does not guarantee a particular result.**

The Petition Clause guarantees only that an individual may “speak freely and petition openly” and that he will be free from retaliation by the government for doing so. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464–65 (1979) (per curiam). But it does not guarantee that the government will listen or respond, or that a particular petition will be effective. *Id.* (holding that the state’s highway commission did not violate unions’ First Amendment petition rights merely because it ignored the union, which it was free to do); *Canfora v. Old*, 562 F.2d 363, 363 (6th Cir. 1977) (“[N]either in the First Amendment [or] elsewhere in the Constitution is there a provision guaranteeing that all petitions for the redress of grievances will meet with success).

Here, Plaintiffs may exercise their petition rights by informing their state elected officials—and even their local officials during the receivership under P.A. 436—of their desires with respect to the passage or enforcement of laws such as P.A. 436. But they cannot control the outcome, and that is really the essence of their claim. If they are unhappy with the outcome of their previous attempts to petition the government, their remedy for a law they dislike is at the polls. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984) (explaining that disagreement with public policy and disapproval of officials’ responsiveness is to be registered principally at the polls).

**4. Rejection of P.A. 4 is not an abridgement of speech or petition and P.A. 436 is not the mirror image of P.A. 4.**

Voters exercised their speech and petition rights when they rejected P.A. 4. They also exercised their speech and petition rights when their elected officials enacted P.A. 436. P.A. 436 is not a reenactment of P.A. 4.<sup>4</sup> It replaces P.A. 72, which was in effect at the time. And the Legislature determined that P.A. 436 was necessary to ensure local fiscal stability.

This is the political process at work. Plaintiffs may exercise their speech and petition rights to express their discontent with current elected officials and/or elect new state officials. The Legislature's decision to vest formerly appointed emergency financial managers with P.A. 436 powers represents this same political process. If Plaintiffs are unhappy with the result of the political process, they can attempt to have their current elected state officials hear and respond to them, or they can seek to elect new officials—again, all part of the political process.

**B. P.A. 436 is also justified by local financial emergencies.**

As courts have recognized, there are free speech compromises that are not unconstitutional. E.g., *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding a law prohibiting display or distribution of campaign materials within 100 feet of a polling place); *Hill v. Colorado*, 530 U.S. 703, 725 (2000) (upholding a statute making it a misdemeanor to pass out material or counsel within 8 feet of a person entering or leaving a health care facility in order to pass out material or counsel). That is why courts routinely uphold all manner of restrictions on petitioning, including registration and disclosure requirements for lobbyists, *United States v. Harriss*, 347 U.S. 612, 625 (1954); limiting access to the courts, *Swekel v. City of River Rouge*,

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<sup>4</sup> However, even if P.A. 436 was a mirror image of P.A. 4, there is no legal prohibition to the Michigan Legislature re-enacting a law identical or similar to one disapproved by referendum. See, e.g. *Reynolds v. Bureau of State Lottery*, 240 Mich. App. 84; 610 N.W.2d 597 (2000).

119 F.3d 1259, 1263 (6th Cir. 1997); and subjecting petitioning to neutral time, place and manner restrictions consistent with public safety and order, *Buckley v. Valeo*, 424 U.S. 1 (1976).

A free speech violation occurs only when the restricted speech is constitutionally protected and when the government's justification for the restriction is insufficient. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). The test for whether a state actor violated a plaintiff's First Amendment right to free speech is: (1) whether plaintiff's speech is protected by the First Amendment; (2) the nature of the forum: public, designated or limited public, or nonpublic; and (3) whether the defendant's justifications for limiting the plaintiff's speech satisfy the requisite standard. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985).

Here, the requisite standard is intermediate scrutiny because P.A. 436 (if it abridges speech at all) is content-neutral. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quotation omitted) ("[T]he government may impose reasonable [content-neutral] restrictions on the time, place, or manner of protected speech, provided the restrictions: (1) 'serve a significant governmental interest;' (2) 'are narrowly tailored;' and (3) 'leave open ample alternative channels for communication of the information.'"). There is no indication that P.A. 436 was intended to suppress any ideas or that it has had that effect.

P.A. 436 satisfies intermediate scrutiny. The State has a significant and compelling interest in addressing the financial distress of local units of government. And the Act does not abridge more speech or petition rights than necessary to address that distress. It gives local elected officials options in solving its difficulties, and if locals choose an emergency manager, provides narrowly tailored procedures for the manager's removal. Again, Plaintiffs have ample channels to voice their concerns to their state elected officials. Moreover, the financial exigencies of the local units of government that are subject to the Act justify any temporary

abridgment of speech or petition rights. Indeed, governments exercise emergency powers that allow them to temporarily suspend constitutional rights.

These emergencies are often economic. As early as 1934, the Supreme Court addressed an economic emergency in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934), and upheld Minnesota's mortgage moratorium law in response to the Great Depression. The Court noted, "[The] principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." *Id.* "When major emergencies strike, the 'law of necessity' is the one rule that trumps all the others." William H. Rehnquist, "All the Laws But One: Civil Liberties in Wartime" (1998).

In sum, P.A. 436 does not abridge First Amendment free-speech or petition rights, and any alleged abridgement cannot be unconstitutional. This claim fails as a matter of law.

#### **VI. The appointment of Detroit's emergency manager does not violate the right to petition (Count 9).**

Count 9 is brought by Council 25, its representative and its negotiator, and alleges abridgment of the First Amendment petition right. (R. 1, Compl., ¶ 212, 214, ID# 43.) The basis for this claim is the appointment of the City of Detroit's Emergency Manager, Kevyn Orr, formerly the City's Emergency Financial Manager under P.A. 72. (*Id.*, ¶ 220, ID# 44-45.) Plaintiffs allege that P.A. 436 allows the Governor and Treasurer to use their powers over local government for their own political and economic benefit. (*Id.*, ¶ 220(f), ID# 44-45.)

For the same reasons Count 8 fails, Count 9 fails as well. Plaintiffs have not lost the right to petition their elected state officials or even their Detroit elected officials. They simply do not have the constitutional right to a particular result.

As to the allegations that P.A. 436 provides the opportunity for Defendants to benefit privately, politically, and economically, they are wholly conclusory. The Act provides numerous



safeguards against any overreaching of power. See, e.g., Mich. Comp. Laws §§ 141.1552(1)(k) & (u) (safeguards as to collective bargaining agreements and borrowing money), 1552(4) (safeguards for selling or transferring public utilities), 1555(1) (safeguards for selling of assets), and 1559(1) (safeguards for proposed contracts, sales, and leases). Count 9 should be dismissed for failure to state a claim.

## **VII. P.A. 436 does not violate the Thirteenth Amendment (Count 10).**

In Count 10, Plaintiffs claim that their Thirteenth Amendment rights have been violated because the communities impacted by the appointment of an emergency manager consist mostly of African-American residents. This claim should be rejected.

The Thirteenth Amendment bars slavery and involuntary servitude and gives Congress the power to impose legislation that prohibits such actions. U.S. Const. amend. XIII. As an initial matter, this claim offers no greater protection than Plaintiffs' equal-protection claim and should therefore be dismissed as redundant. See *Johnson v. Harron*, 1995 WL 319943 at 6 (N.D.N.Y., May 23, 1995) (“[I]n the realm of equal protection, the Thirteenth Amendment offers no protection not already provided under the Fourteenth Amendment.”)

In any event, there is no violation of the Thirteenth Amendment and no legislation enacted by Congress pursuant to the Thirteenth Amendment. The official actions challenged in this case all emanate from the impact of legislation to fix financially troubled local units of government. P.A. 436 does not benefit white citizens within these communities in a way that it does not benefit black citizens. Nor does P.A. 436 “place[] a burden on black citizens as an unconstitutional ‘badge of slavery.’” *City of Memphis v. N.T. Green*, 451 U.S. 100, 124 (1981). Quite the opposite, P.A. 436’s purpose is to benefit all Michigan citizens, of every race and ethnicity. Count 10 should be dismissed for failure to state a claim.



### CONCLUSION

For the reasons set forth above, Plaintiffs have failed to state claims upon which relief may be granted, and the Complaint should be dismissed in its entirety, with prejudice.

Respectfully submitted,

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Attorney General

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Dated: May 15, 2013

### CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such.

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## EXHIBIT B

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
. Detroit, Michigan  
. July 24, 2013  
Debtor. . 10:02 a.m.  
. . . . .

HEARING RE. MOTION OF DEBTOR, PURSUANT TO SECTION 105(a)  
OF THE BANKRUPTCY CODE, FOR ENTRY OF AN ORDER CONFIRMING  
THE PROTECTIONS OF SECTIONS 362, 365 AND 922 OF THE  
BANKRUPTCY CODE (DOCKET #53) AND MOTION OF DEBTOR, PURSUANT  
TO SECTION 105(a) OF THE BANKRUPTCY CODE, FOR ENTRY OF AN  
ORDER EXTENDING THE CHAPTER 9 STAY TO CERTAIN (A) STATE  
ENTITIES, (B) NON-OFFICER EMPLOYEES AND (C) AGENTS AND  
REPRESENTATIVES OF THE DEBTOR (DOCKET #56)  
BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: All right. So I will allow 15 minutes  
2 for each of the creditors that have filed objections. These  
3 are the Michigan Council 25 of AFSCME, Syncora, the UAW  
4 together with Creditors Robbie Flowers, Michael Wells, Janet  
5 Whitson, Mary Washington, and Bruce Goldman, the Detroit  
6 public safety unions, if I can refer them -- refer to them by  
7 that, and the General Retirement System of the City of  
8 Detroit and the Police and Fire Retirement System of the  
9 city. It doesn't matter to me, counsel, the order in which  
10 you proceed, so I will leave that to you to work out.

11 MS. LEVINE: I'm going to go with alphabetical.

12 THE COURT: Okay.

13 MS. LEVINE: Good morning, your Honor. Sharon  
14 Levine, Lowenstein Sandler, for Michigan Council 25 of the  
15 American Federation of State, County, and Municipal Employees  
16 or AFSCME, as it's been referred to here today.

17 Your Honor, very briefly, it's clear that your Honor  
18 has read all the papers, and we very much appreciate that  
19 given the short time frame that we've been before this Court.  
20 Bankruptcy Code Section 105 is extraordinary relief,  
21 extraordinary in that it's only used to enforce rights that  
22 already exist under the Bankruptcy Code, so it's not there to  
23 create new rights that don't currently exist under the Code.  
24 What we have here in a Chapter 9 case, which is more  
25 restrictive than, for example, a Chapter 11 case, is the

1 situation where if, in fact, the state has not properly  
2 authorized the Chapter 9 filing, there are rights that don't  
3 exist under the Bankruptcy Code. If Chapter 9, as has  
4 historically been seen through the unconstitutional finding  
5 of predecessors to Chapter 9, is really being used here to  
6 avoid state constitutional rights, then Chapter 9 in and of  
7 itself is potentially unconstitutional. If not, it has to be  
8 construed narrowly in order to read it constitutionally. We  
9 would respectfully submit that using 105 to find rights that  
10 don't otherwise exist, particularly of a constitutional  
11 nature, is an extremely broad use of 105. This isn't a  
12 situation where we're saying to the controller or the  
13 governor or Mr. Orr, you know, don't respond to discovery  
14 requests in a state court action in a foreign jurisdiction  
15 because we need your attention here. We're taking away very  
16 fundamental constitutional rights.

17 Secondly, your Honor, if, in fact --

18 THE COURT: So your argument about the narrow  
19 application of Section 105 in this case is really a result of  
20 the fact that it's a Chapter 9.

21 MS. LEVINE: Yes, your Honor.

22 THE COURT: It's not an argument that's based on  
23 Section 105, per se.

24 MS. LEVINE: Yes, your Honor. In a Chapter 11  
25 you'll have circumstances, for example, where even in the

1 broader case of a Chapter 11, you won't use Article -- you  
2 won't use Section 105 to grant a casino license or a liquor  
3 license or tell a utility board they can't change rates, but  
4 we have an even narrower situation here because we're in  
5 Chapter 9.

6 Two, Chapter 9 can't be used if, in fact, the state  
7 has not authorized under its constitution and its laws the  
8 Chapter 9 filing. The Chapter 9 filing here is arguably  
9 flawed because it intends to go after the pensions. If it  
10 goes after the pensions, it arguably violates the state  
11 constitution and can't be before this Court, so, again, the  
12 issue with regard to whether or not we have an appropriate  
13 state constitutional flaw -- sorry. The issue with regard to  
14 whether or not we have an appropriate filing is necessarily  
15 limited by whether or not we have an appropriate state -- we  
16 have an inappropriate state constitutional authorization. If  
17 we have an inappropriate state constitutional authorization,  
18 that is not simply an implementation tool under 105. That  
19 is, in essence, a substantive right that's being creative --  
20 created under 105 that does not exist in the state court.

21 In addition to that, your Honor, and also  
22 importantly, three, individual citizens of the City of  
23 Detroit have the absolute right to protect their own  
24 constitutional rights. If we say to them they can't go to  
25 the state courts that are there for the protection of their

1 constitutional rights in part, then we are -- then we're  
2 using 105 again way more broadly than it gets used in the  
3 ordinary course as simply an implementation tool. We're  
4 creating more substantive rights. And while this Court  
5 has --

6 THE COURT: Well, but why isn't the extended stay  
7 that the city seeks here simply a procedural mechanism to  
8 funnel such challenges to the Bankruptcy Court and,  
9 therefore, does not have the effect of denying citizens or  
10 other creditors of their rights to have their constitutional  
11 claims heard?

12 MS. LEVINE: Your Honor, if this Court is a court of  
13 secondary jurisdiction, no disrespect, with -- but if you  
14 look at federalism, comity, abstention, and the state courts  
15 are the courts of primary jurisdiction, we would respectfully  
16 submit that unlike, for example, determining in a Chapter 11  
17 case that there's a validly perfected security interest  
18 because you've looked at state law and the UCC is properly  
19 filed, we have a very fundamental right here that this Court  
20 is being asked to address, so what we're saying is instead of  
21 going to the court that's primarily responsible, we're going  
22 to come into this Court instead, and it's not as if there's  
23 delay or uncertainty with regard to the fact that those  
24 matters are going to get heard and considered quickly. We  
25 already have state court litigation pending, and the state



1 appellate courts are poised and ready to rule, so there's no  
2 reason to divest them of that appropriate jurisdiction under  
3 concepts of federalism, comity, and abstention and move that  
4 here to a court of secondary jurisdiction on those issues.

5           Your Honor, fourth, with regard to the form over  
6 substance, the procedural arguments with regard to 105, in  
7 certain circumstances where 105 is being used for things like  
8 stopping discovery or minimal things like that, that's one  
9 set, but the Federal Rules of Civil Procedure are put in  
10 place in order to protect parties and provide due process.  
11 There can't be a more fundamental situation where you need to  
12 enforce those types of rights than when you're dealing with  
13 basic fundamental constitutional rights, and we respectfully  
14 submit that even though there are circumstances where  
15 expediency mandates the use of 105 quickly, this is not one  
16 of those circumstances.

17           Your Honor, the breathing spell under 105 -- the  
18 breathing spell under the Bankruptcy Code and the use of 105  
19 to extend the breathing spell is only appropriate if, in  
20 fact, the underlying bankruptcy is an appropriate bankruptcy.  
21 The idea that there's a breathing spell to continue what is  
22 potentially an unconstitutional or illegal -- not  
23 intentionally, no motive or anything, your Honor, but --  
24 proceeding is clearly not anything that 105 was designed to  
25 implement.

1           Your Honor, we would respectfully submit that these  
2 are very, very fundamental rights, and unlike a Chapter 11  
3 case where you have a defined benefit plan where if, in fact,  
4 it is terminated, there's federal insurance under the PBGC up  
5 to \$57,000, or if you have a multi-employer plan, even if an  
6 employer withdraws, the beneficiaries themselves are  
7 protected, here our members who participate at most are at or  
8 below \$19,000 a year. Clearly there's no safety net. These  
9 issues are hard issues. The collateral advantage to sending  
10 this back to the state court for an appropriate decision is  
11 that the conversations which we believe should have been  
12 happening more robustly before the filing could happen now.  
13 We respectfully -- we thank your Honor for the time, and we  
14 appreciate your Honor's consideration.

15           THE COURT: Thank you. Sir.

16           MR. BENNETT: Good morning, your Honor. Ryan  
17 Bennett of Kirkland & Ellis on behalf of Syncora Guarantee  
18 and Syncora Capital Assurance. Your Honor, as we attempted  
19 to describe in our papers, my client insures, in some cases  
20 owns certain securities called the certificates of  
21 participation, which were taken out in 2006 to fund some of  
22 the city's pension liabilities. We also insure a swap --  
23 four swaps related to those securities that are tied to the  
24 interest rate, the floating interest rate associated with  
25 them.

1 THE COURT: Um-hmm.

2 MR. BRENT: However, this is the city's option.

3 This isn't a requirement of law that they indemnify these --

4 THE COURT: Um-hmm.

5 MR. BRENT: -- just as -- my lawsuit is also against  
6 various state actors within the State of Michigan, which --  
7 but, again, their wanting to extend this to them would  
8 prevent me from litigating my claims against the state  
9 officials that have already been denied immunity, and it is  
10 currently pending. Those portions they've appealed to the  
11 Circuit Court. So now that they're trying to extend this  
12 stay, now the Sixth Circuit Court of Appeals case of Brent  
13 versus Wayne County, et al. will be stayed as well where the  
14 different state defendants -- state employees have uphill  
15 decision to deny their qualified and absolute immunity.

16 THE COURT: The defendants in your particular suit  
17 are both city employees and other defendants are state  
18 employees?

19 MR. BRENT: Yes, and there's also state contractors  
20 involved in the lawsuit.

21 THE COURT: Contractors also. Thank you, sir.  
22 Would anyone else like to be heard?

23 MR. SANDERS: Good morning, your Honor. My name is  
24 Herb Sanders, and I represent the plaintiffs in the case of  
25 Phillips versus Snyder pending before this Court, Case Number

1 2:13-CV-11370, before Judge Steeh. That is a case that  
2 challenges the constitutionality of PA 436. Motions for  
3 summary -- for at least one summary disposition or summary  
4 judgment argument have been scheduled. As I initially read  
5 the request for stay extension motion filed by the city, it  
6 appeared that the city was seeking an extension of stay  
7 concerning financial matters that were being litigated, but  
8 pursuant to the oral presentation of the city's attorney, it  
9 concerns me when she has indicated -- and I paraphrase --  
10 that she seeks relief concerning any litigation that might  
11 interfere with the city's rights as a Chapter 9 debtor. And  
12 I would suggest to the Court to the extent that it might be  
13 proposed or suggested that the litigation which I have  
14 referenced in which the constitutionality of PA 436 is to be  
15 determined by another judge in this court interferes with the  
16 rights of the city as a Chapter 9 debtor, that that case not  
17 be included as part of the stay order that this Court would  
18 issue. I believe it's imperative to this community, to this  
19 state that those issues be determined and, in fact, should  
20 probably be determined before the bankruptcy proceeds, but I  
21 would encourage the Court to not give a broad order if any  
22 order were to issue that would be inclusive of matters that  
23 are not financial matters such as there are other matters  
24 that I know that the union, AFSCME, and others are a part of  
25 seeking FOIA requests from the city, injunctive relief as it

1 relates to these types of matters, and I would ask the Court  
2 to consider not giving such a broad order --

3 THE COURT: Um-hmm.

4 MR. SANDERS: -- that that type of information could  
5 not be obtained and we could not have a determination as to  
6 the constitutionality of PA 436 by this Court.

7 THE COURT: Um-hmm.

8 MR. SANDERS: Thank you, your Honor.

9 THE COURT: Thank you. Sir, can you just give me  
10 your name again, please?

11 MR. SANDERS: Herb Sanders.

12 THE COURT: Mr. Sanders. Thank you, sir.

13 MR. SCHNEIDER: May it please the Court, Matthew  
14 Schneider, chief legal counsel to the Attorney General. I'm  
15 here on behalf of the State of Michigan. Your Honor, I'm  
16 here for a very, very limited purpose. As counsel to the  
17 debtor has indicated, they are not seeking to abrogate the  
18 exceptions in Section 362(b), and I know that this is a  
19 motion regarding Section 362, so our position is is that if  
20 the Court is, indeed, inclined to grant the motion regarding  
21 the stay, that the Court's order reflect that nothing in the  
22 Court -- nothing what the Court is doing will actually  
23 abrogate the exceptions afforded under 362(b).

24 THE COURT: Is there a specific exception you're  
25 concerned about?

## EXHIBIT C

**IN THE UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

|                            |   |                       |
|----------------------------|---|-----------------------|
|                            | X |                       |
|                            | : |                       |
| In re                      | : | Chapter 9             |
|                            | : |                       |
| CITY OF DETROIT, MICHIGAN, | : | Case No. 13-53846     |
|                            | : |                       |
| Debtor.                    | : | Hon. Steven W. Rhodes |
|                            | X |                       |

**DEBTOR'S BRIEF IN OPPOSITION TO PETITION FOR ORDER  
LIFTING STAY<sup>1</sup>**

Six weeks after the Emergency Manager's appointment became effective, the Plaintiffs filed the Lawsuit seeking a judgment declaring not only the Emergency Manager's appointment to be invalid, but all actions he has taken, including the filing of this chapter 9 case, to be unenforceable. Yet, the Plaintiffs somehow assert that granting them relief from stay to prosecute this Lawsuit to judgment will have "no effect whatsoever on the City's ability to reorganize" because it is "completely unrelated" to the chapter 9 case. Stay Relief Brief at 3, 8. This is not accurate nor is the timing of the Lawsuit's filing a coincidence. The Stay Relief Motion is nothing more than a thinly veiled attempt to litigate the

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<sup>1</sup> Capitalized terms not defined in this Brief in Opposition, have the meanings given to them in the City's Objection to Petition for Order Lifting Stay, filed contemporaneously with this brief.

City's eligibility before a different court in circumvention of the Court's Stay Extension Order and the process this Court adopted to resolve eligibility objections. The Plaintiffs have not identified any cause, much less sufficient cause, to allow them to proceed with the Lawsuit. Accordingly, the Stay Relief Motion must be denied.

## **ARGUMENT**

In support of the Stay Relief Motion, the Plaintiffs advance three arguments: (1) the Stay Extension Order does not apply to the Lawsuit, either because it did not specifically identify the Lawsuit or because it cannot be read so broadly as to include the Lawsuit; (2) the Court did not have the authority to enter the Stay Extension Order; (3) the Plaintiffs have demonstrated cause for relief from the Automatic Stay. None of these arguments have any merit.

### **I. The Stay Extension Order Applies to the Lawsuit**

The Plaintiffs misunderstand or misconstrue the relief granted in the Stay Extension Order. The Lawsuit is precisely the type of case that the Stay Extension Order was intended to cover and, contrary to the Plaintiffs' assertions, it does not provide the Defendants "complete immunity from all litigation." Stay Relief Brief at 9.

The Plaintiffs devote much of the Stay Relief Motion in a misguided attempt to argue that only a limited set of actions within the definition of "Prepetition



Lawsuits” are covered by the Stay Extension Order. The Plaintiffs reason that, because the Lawsuit is not covered by the definition of “Prepetition Lawsuits,” that case is not subject to the Stay Extension Order. Stay Relief Brief at 8.

The Plaintiffs quote only paragraph 3 of the Stay Extension Order which states: “For the avoidance of doubt, each of the Prepetition Lawsuits hereby is stayed, pursuant to section 105(a) of the Bankruptcy Code, pending further order of this Court.” This statement clarifies that a small group of three “Prepetition Lawsuits” are included in the relief granted and therefore are stayed. But nowhere does this statement limit the scope of the relief sought or obtained so that it would apply only to these three Prepetition Lawsuits.

The primary relief is granted in the prior paragraphs of the Stay Extension Order. Paragraph 1 states, without reservation or limitation of any kind, that the Stay Extension Motion is “granted.” Paragraph 2 of the Stay Extension Order then states broadly that:

Pursuant to section 105(a) of the Bankruptcy Code, the Chapter 9 stay hereby is extended in all respects (to the extent not otherwise applicable) to the State Entities (defined as the Governor, the State Treasurer and the members of the Loan Board, collectively with the State Treasurer and the Governor, and together with each entity’s staff, agents and representatives), the Non-Office Employees and the City Agents and Representatives.

As such, the Stay Extension Order makes clear that the Automatic Stay was extended to the Governor and Treasurer to stay any and all cases that “have the

direct or practical effect of denying the City the protections of the” Automatic Stay so as to aid the City in the administration of its bankruptcy case and ensure the City is afforded the breathing spell it needs to focus on developing and negotiating a plan for adjusting its debts. See Stay Extension Motion at ¶ 15. This District Court judge in the Lawsuit agreed, finding, after review of an objection by the Plaintiffs, that “the plain language of the stay order would apply to this lawsuit.”<sup>2</sup> Stay Relief Motion, Exhibit A.

If the Lawsuit were to continue, and if the District Court were to grant judgment in favor of the Plaintiffs, it is almost certain that the Plaintiffs (and others) would argue before this Court that the decisions and actions of the Emergency Manager – including the filing and prosecution of this chapter 9 case – are void and of no effect. Reading the prayer for relief in the Amended Complaint is all that is necessary to reach that conclusion. Reduced to its basics, the Lawsuit is yet another vehicle to challenge the City’s eligibility for chapter 9 relief or otherwise attempt to interfere with the City’s restructuring efforts. Such a result

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<sup>2</sup> The Plaintiffs may not re-litigate this issue in this Court. See e.g., Georgia-Pacific Consumer Products LP v. Four-U-Packaging, Inc., 701 F.3d 1093, 1098 (6th Cir. 2012) (holding that issue preclusion precludes relitigation where (1) the precise issue was raised and litigated in the prior proceeding; (2) the determination of the issue was necessary to the outcome of the prior proceedings; (3) the prior proceedings resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in the prior proceeding).

would have the direct and practical effect of denying the City the protections of the Automatic Stay and “interfere with the City’s activities in this chapter 9 case” (Stay Extension Motion at ¶ 20) – the precise result that the Stay Extension Order was seeking to avoid. Furthermore, this Court has assiduously and correctly endeavored to consolidate all possible objections to the eligibility of the City to seek chapter 9 relief before it and to avoid the exact result that would be occasioned if stay relief were to be granted to the Plaintiffs to permit an attack on PA 436 and all that implicates. Thus, the Plaintiffs’ arguments that either the Stay Extension Order does not apply to the Lawsuit or that it is too broad to be enforced, fail. Stay Relief Brief at 9. Accordingly, as the District Court has already found, the Stay Extension Order applies to the Lawsuit.

## **II. The Court Had Authority to Enter the Stay Extension Order**

The Plaintiffs also argue that the Court did not have the authority to enter the Stay Extension Order. This is nothing more than a collateral attack upon the Stay Extension Order. Similar arguments were timely raised by other parties and rejected by this Court.<sup>3</sup> As the Plaintiffs recognize, a bankruptcy court may

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<sup>3</sup> Other parties have raised similar objections to the Stay Extension Motion. See Dkt. No. 84 (the “AFSCME Objection”), ¶ 45-46 (arguing no identity of interests between the City and State Entities); Dkt. No. 141 (the “Retirement Systems Objection”), pp. 16-17 (same, and adding the argument that “[a] judgment obtained in any one of [certain pre-petition lawsuits against the Governor, the Emergency Manager, and others] will not be a judgment against the City. . . .”); see also Dkt. No. 146 (the “Flowers Objection”), ¶ 4 (arguing that “[a]t no point have the

*Continued on next page.*

extend the automatic stay where “there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.” In re Eagle-Picher Indus., Inc., 963 F.2d 855, 861 (6th Cir. 1992) (quoting A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986)). The Lawsuit seeks a judgment against the Defendants declaring not only the Emergency Manager’s appointment to be invalid, but all actions he has taken, including the filing of this chapter 9 case, to be unenforceable. Thus, any judgment against the Defendants would in effect be a judgment or finding against the City. As a result, under well-established Sixth Circuit precedent, this Court had the authority to enter the Stay Extension Motion. The Plaintiff’s arguments to the contrary must be rejected.

### **III. No Cause Exists to Grant Plaintiffs Relief from the Automatic Stay**

Section 362(a) of the Bankruptcy Code provides in relevant part that:

a petition filed under . . . this title . . . operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the

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*Continued from previous page.*

*Flowers* plaintiffs sued . . . or sought any relief against” the City, its officials, or employees). The Debtor addressed these arguments in its reply (Dkt. No. 128, ¶¶ 6-8). The Plaintiffs add nothing to this issue by raising these same arguments again.

debtor that arose before the commencement of the case . .

. .

11 U.S.C. § 362(a). The Automatic Stay “is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions.” Javens v. City of Hazel Park (In re Javens), 107 F.3d 359, 363 (6th Cir. 1997) (quoting H.R. REP. NO. 95-595, at 340 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6296).

Section 362(d) of the Bankruptcy Code authorizes a bankruptcy court to grant relief from the Automatic Stay in limited circumstances. See 11 U.S.C. § 362(d). In particular, section 362(d)(1) of the Bankruptcy Code provides that a party in interest may obtain relief from the Automatic Stay “for cause, including the lack of adequate protection of an interest in property of such party in interest.” 11 U.S.C. §362(d)(1).

“The Bankruptcy Code does not define ‘cause’ as used in [section] 362(d)(1). Therefore, under [section] 362(d), ‘courts must determine whether discretionary relief is appropriate on a case by case basis.’” Chrysler LLC v. Plastech Engineered Prods., Inc. (In re Plastech Engineered Prods., Inc.), 382 B.R. 90, 106 (Bankr. E.D. Mich. 2008) (quoting Laguna Assocs. L.P. v. Aetna Casualty & Surety Co. (In re Laguna Assocs. L.P.), 30 F.3d 734, 737 (6th Cir. 1994)). The determination of whether to grant relief from the Automatic Stay “resides within

the sound discretion of the Bankruptcy Court.” Sandweiss Law Center, P.C. v. Kozlowski (In re Bunting), No. 12-10472, 2013 WL 153309, at \*17 (E.D. Mich. Jan. 15, 2013) (quoting In re Garzoni, 35 F. App'x 179, 181 (6th Cir. 2002)).

To guide the bankruptcy court's exercise of its discretion . . . the Sixth Circuit identifies five factors for the court to consider: (1) judicial economy; (2) trial readiness; (3) the resolution of the preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; and (5) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors.

Bunting, 2013 WL 153309, at \*17 (quoting Garzoni, 35 F. App'x at 181) (internal quotation marks omitted). In determining whether cause exists, however, “the bankruptcy court should base its decision on the hardships imposed on the parties with an eye towards the overall goals of the Bankruptcy Code.” Plastech, 382 B.R. at 106 (quoting In re C & S Grain Co., 47 F.3d 233, 238 (7th Cir. 1995)).

Here, consideration of the these factors confirms that no cause (much less sufficient cause) exists to justify relief from the Automatic Stay to allow the Lawsuit to proceed. With respect to the first factor, the interests of judicial economy weigh heavily in favor of denying the Stay Relief Motion. Numerous parties have raised similar eligibility issues in this chapter 9 case<sup>4</sup> (the Plaintiffs not being one of them) that the Plaintiffs seek to litigate in the Lawsuit in front of

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<sup>4</sup> See e.g., The City’s Consolidated Reply to Objection to the Entry of an Order for Relief at 38-44, 89, 95-96, 98. [Dkt. No. 765].

the District Court. As this Court emphasized, litigating eligibility issues in two different courts, simultaneously “does not promote judicial or party efficiency; it is the antithesis. The most efficient way to litigate eligibility in this case is in one court – the bankruptcy court – and then on appeal in the next.” Opinion and Order Denying Motion to Stay Proceedings Pending Determination of Motion to Withdraw the Reference at 19. [Dkt. No. 1039]. Accordingly, judicial economy dictates staying the Lawsuit so as to permit this Court to address the PA 436 Eligibility Objections in the single, unified context of the eligibility trial.

With respect to the second factor, the Lawsuit is in its preliminary stages. The Defendants’ motion to dismiss remains pending. No discovery has been taken. Thus, the Lawsuit has not even advanced beyond the pleading stage and is not trial ready. The third factor also weighs in favor of denying the Stay Relief Motion as the Court has not even resolved the City’s eligibility for relief in this chapter 9 case. Nothing could be more basic or preliminary to the ultimate outcome.

Further, concerning the fourth factor, as set forth in the Defendants’ motion to dismiss and in the Defendants’ Opposition to the Stay Relief Motion, the Plaintiffs have not demonstrated a likelihood of success on the merits.

Finally, the fifth factor weighs in favor of denying the Stay Relief Motion. Although the City is not currently a party in the Lawsuit, the impact that the

Lawsuit may have on the City and its restructuring efforts may require the City to intervene or otherwise become further involved and take other actions if the Stay Relief Motion is granted. Requiring the City to defend the Lawsuit in the District Court would distract the City from its efforts to restructure, diverting its limited resources at a time when it is both working to negotiate and deliver a plan of adjustment quickly and engaged in a substantial amount of discovery and litigation (all on its own expedited timeframe) arising in the bankruptcy case itself. The City does not need further impediments to its restructuring efforts. This Court has consistently endeavored to bring all matters which may affect the eligibility of the City before it and have the issues resolved in one forum. Allowing the Lawsuit to proceed in the District Court would cast uncertainty<sup>5</sup> over the eligibility and restructuring process and may chill negotiations among the parties or adversely affect the confirmation of the plan of adjustment.

In short, allowing the Lawsuit to proceed would undermine the protections of the Automatic Stay and interfere with the City's efforts to restructure. The City sought relief under chapter 9 in part to obtain the “breathing spell” afforded by the

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<sup>5</sup> This Court acknowledged that the uncertainty occasioned just by the eligibility objections already before it will likely slow, if not stall entirely, the “City’s progress in recovering its financial, civic, commercial, and cultural life and in revitalizing itself.” Opinion and Order Denying Motion to Stay Proceedings Pending Determination of Motion to Withdraw the Reference at 23. [Dkt. No. 1039]. Having the City’s eligibility adjudicated simultaneously in two courts obviously compounds that uncertainty.



Automatic Stay and the consequent protection from its creditors while it restructures its affairs and prepares a plan of adjustment. The City's finances would be further depleted and its personnel distracted from their mission to operate the City for the benefit of its citizens and restructure its affairs if it were denied this basic protection of chapter 9 and forced to defend itself against the Plaintiffs so early in the case. Accordingly, the overall goals of chapter 9 weigh largely in favor of denying stay relief to the Plaintiffs.

### **CONCLUSION**

WHEREFORE, for the foregoing reasons, the City respectfully requests that this Court (a) deny the Stay Relief Motion; and (b) grant such other relief to the City as the Court may deem proper.

Dated: September 26, 2013

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF DETROIT

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
 . Detroit, Michigan  
 . October 2, 2013  
Debtor. . 10:00 a.m.  
 . . . . .

HEARING RE. AMENDED MOTION OF CREDITOR DEBORAH RYAN,  
AN INTERESTED PARTY, FOR RELIEF FROM THIS COURT'S ORDER  
STAYING PROCEEDINGS; MICHIGAN COUNCIL 25 OF THE AMERICAN  
FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,  
AFL-CIO, MOTION FOR ENTRY OF AN ORDER MODIFYING THE  
AUTOMATIC STAY SOLELY TO ALLOW ADMINISTRATIVE LAW JUDGE  
TO EXECUTE HIS OPINION AND LIQUIDATE DAMAGE AWARD BEFORE  
HE RETIRES ON OCTOBER 4, 2013; PETITION FOR ORDER  
LIFTING STAY  
BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

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Proceedings recorded by electronic sound recording,  
 transcript produced by transcription service.

1 THE CLERK: All rise. Court is in session. Please  
2 be seated. Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: One moment, please. Okay. So is it  
4 okay with everyone if we proceed with the motion for relief  
5 from the stay filed by Deborah Ann Ryan?

6 MR. GOODMAN: William Goodman, your Honor. We're  
7 ready.

8 THE COURT: Okay. Step forward, please, sir, and  
9 you may begin.

10 MR. GOODMAN: May I ask if I may have my client sit  
11 closer so that she can hear the proceedings?

12 THE COURT: Sure, sure, absolutely.

13 MR. GOODMAN: Step forward, Ms. Ryan.

14 THE COURT: I wonder if you could make room for Ms.  
15 Ryan at counsel table there.

16 MR. GOODMAN: Good morning, your Honor. My name is  
17 William Goodman, and I represent Mrs. Ryan, who is a  
18 petitioner in this matter. And I know the Court is  
19 unfamiliar with me, but I am -- I have attended a few of  
20 these proceedings, and I'm well-aware of the attention that  
21 the Court has paid to other pleadings that have been filed  
22 and presume that the same is true for these as well.

23 THE COURT: Yes, sir.

24 MR. GOODMAN: So I will not impose or reiterate  
25 everything that has been said; however, I thought that for

1 just a few moments, since the issue of whether or not there  
2 is a likelihood of success for the creditor, Mrs. Ryan, in  
3 this case, has been put in issue, I might just address it for  
4 a moment. As Jack Webb used to say, just the facts and, more  
5 pertinent, just the stark facts in this matter.

6 Mrs. Ryan is the personal representative of the  
7 estate of her daughter, Patricia Williams, who was murdered  
8 on September the 22nd, 2009, by her then husband, who,  
9 immediately after he murdered her extremely brutally, killed  
10 himself. This is a situation which had been building up for  
11 at least a couple of days. It involves two sets of  
12 defendants, those -- the police officials from these --  
13 Township of Canton as well as from the City of Detroit. At  
14 first the Canton Township responded and finally eventually  
15 learned the identities of the domestic violence victim and  
16 the perpetrator, and the perpetrator -- both, in fact, were  
17 Detroit police officers. Canton then essentially turned the  
18 matter over to Detroit and in so doing failed to enforce the  
19 law as we say it should have been enforced, violated the  
20 equal protection clause, we are claiming, and thereby created  
21 a cause of action under Section 1983 against Canton. That is  
22 not pertinent today other than the fact that those facts are  
23 so intertwined with the facts involving the City of Detroit  
24 because what Canton did was turn the matter over and the  
25 decision as to what to do with Mr. Williams over to the City

1 of Detroit, which essentially, without any basis whatsoever,  
2 asserted to Canton he's mentally fine. He had left a suicide  
3 note in addition to having beaten up his wife, waved a gun  
4 around and consumed a bottle of alcohol in a short period of  
5 time, that he was mentally fine, that he was ready to use a  
6 gun -- he was going to the range, in fact, the very next  
7 day -- and not to worry and to cancel the LEIN notice that  
8 Canton had posted. Canton officers have testified that had  
9 that notice not been canceled, they would have tracked him  
10 down -- pinged him, I think is the phrase that law  
11 enforcement uses -- and thrown him into a psychiatric unit.

12 None of that happened, and, therefore, this  
13 generated a 14th Amendment claim under the substantive due  
14 process theory of what is called state-created danger. And  
15 we've cited the Kallstrom case, which is the leading case in  
16 the Sixth Circuit on this point, with the cause -- with the  
17 basis for that cause of action.

18 There are cases against two individual officers,  
19 actually supervisors, Sergeant Kozloff and Inspector  
20 Blackmon, and, in addition, there's a case against the City  
21 of Detroit, which is called a custom and policy case, a Monel  
22 case, which is based upon the fact that Detroit had -- and  
23 I've attached to our papers a force investigation report,  
24 which acknowledges this -- the highest ratio or the highest  
25 proportion of police officer suicides in the United States.

1     Nonetheless, there was no policy. There was no training.  
2     There was no guidelines whatsoever for supervisors to deal  
3     with officers who were undergoing non-duty-related stress  
4     that could require hospitalization or affect their duties.  
5     In fact, someone who wanted help, who wanted the lifeline of  
6     the -- an assistance telephone number that the police  
7     department put up to its officers, if they tried to make a  
8     telephone call, that number was disconnected.

9             So this then -- and, in fact, in addition, Officer  
10    Williams himself was, I think, a problematic officer. He was  
11    described by deputy chief of the Detroit Police Department,  
12    James Tolbert, as someone who showed a pattern of  
13    disobedience throughout his history, who was disruptive, who  
14    basically refused to follow rules and regulations. That's  
15    who he was, and, nonetheless, they gave him a clean bill of  
16    health and told Canton, yes, drop your LEIN notice. That  
17    is -- I think, meets the tests of the Kallstrom case and  
18    establishes a valid state-created danger claim. All of this,  
19    by the way, has been established, as we have pointed out,  
20    through extensive discovery, which we have taken, numerous  
21    depositions, almost 30, and, as I indicated in our papers,  
22    this matter has been teed up, in fact, argued -- we are  
23    waiting for an opinion from Judge Goldsmith as to the Canton  
24    defendants, and he has told us what his decision is going to  
25    be, but he hasn't rendered an opinion, so I think it would be



1 improper for me to state that now, although if asked I would.

2 And we were just about ready to file a response to  
3 the city's papers to the motion for summary judgment, and I  
4 think somewhat unfairly the city points to its papers to show  
5 that we have a small likelihood of success in the underlying  
6 matter without our ever having had a chance to file a  
7 response because we were basically cut short on that by this  
8 filing in this case. Nonetheless, as I've stated, I think  
9 the facts -- every one of the facts that I asserted today and  
10 many more can be documented and proven, and there's certainly  
11 a factual question as to each of them.

12 Now, this motion, I think, involves an unusual claim  
13 in that what we are saying here is that a stay will diminish  
14 my client's rights under Section 1983 of the Civil Rights Act  
15 and, therefore, directly under the 14th Amendment. She has  
16 rights to full compensation, to an orderly process, to have  
17 her case heard, to not have it delayed or diminished or  
18 divided up in any way. And by extending the stay to her, her  
19 rights have been affected, and, therefore, her -- in effect,  
20 the stay to Mrs. Ryan, both the stay as to the City of  
21 Detroit and the extended stay as to the individual Detroit  
22 officers, violates her Constitutional rights.

23 And I think the argument has been elaborated fairly  
24 successfully in our papers. If the Court has any questions,  
25 I'd be happy to answer them, but I will say this. The

1 purpose of Section 1983 to pursue these kinds of actions is  
2 not only to compensate victims and fully and completely  
3 compensate them, but it is, too, as a mechanism that Congress  
4 has created to enforce the Constitution so that people's  
5 rights are not violated. Without it, there would be,  
6 Congress has determined, additional violations, further  
7 violations by state officials of people's constitutional  
8 rights, 14th Amendment rights, and other rights as well.

9 A stark example of this -- I think this is a stark  
10 example, but perhaps a simpler example would be if some  
11 benighted community somewhere, having not heard about the  
12 civil rights movement or the Civil Rights Act of 1964, or  
13 something else still maintained public facilities that were  
14 segregated, and then that municipality goes into bankruptcy,  
15 and a lawsuit is brought to -- for damages perhaps and to  
16 desegregate those facility -- for injunctive relief to  
17 desegregate those facilities. The municipality could easily  
18 say this is going to cost us money to undertake this kind of  
19 major change in our operations at this time. Nonetheless, it  
20 would be completely violative of the 13th, 14th, and 15th  
21 Amendment for a stay in bankruptcy to operate in such a way.  
22 In that respect, really Mrs. Ryan's rights are no different.  
23 Her rights or her daughter's rights were violated fairly  
24 blatantly by actions of the City of Detroit, and, as a  
25 result, we have sought relief in front of Judge Goldsmith and

1 seek to continue that relief.

2 Now, in addition to the constitutional arguments,  
3 which I think I have -- as I said, I've alluded to today, and  
4 I think --

5 THE COURT: Well, but why wouldn't the law  
6 distinguish between an ongoing violation that demands remedy  
7 from this case?

8 MR. GOODMAN: Well, the law does distinguish between  
9 those kinds of situations. Clearly there's different kinds  
10 of relief. There's injunctive relief. There are damages.  
11 There are distinctions obviously, and I agree with the Court  
12 in that respect. However, I do not think that the cases  
13 which say that the federal courts -- Article III courts are  
14 the way to proceed to enforce these rights is -- acknowledge  
15 that simply because this is an action for damages, the person  
16 who has been so injured can wait and that that diminution of  
17 their case, the diminution of their compensation and,  
18 therefore, their ability to fully enforce the Constitution is  
19 acceptable. I understand what the Court is saying, that  
20 there are distinctions, of course, but the other point -- the  
21 point that I made initially continues to be the case. If law  
22 enforcement officers or other public officials know that they  
23 are not going to be subjected to deposition questioning,  
24 judgment by judges and juries, and forced to pay  
25 compensation, this is a way in which these constitutional

1 rights will be diminished and violations will increase, so in  
2 that sense I think that there is a similarity between the  
3 two.

4 THE COURT: To the extent the law would recognize  
5 that concern, wouldn't it -- couldn't it be addressed by  
6 granting relief from the stay to allow you to liquidate your  
7 claim -- that is, to fix the amount of the claim -- without  
8 allowing you to actually collect on the claim against the  
9 city?

10 MR. GOODMAN: If I understand your question, what  
11 you are asking is a reiteration of an argument or something  
12 that I read in the debtor's papers here, which is that  
13 doesn't do Mrs. Ryan any good simply to have a new form of  
14 claim in the form of a liquidated claim. That's what I  
15 understand you to be asking. Am I more or less in the right  
16 area, your Honor?

17 THE COURT: Well, sure.

18 MR. GOODMAN: I think I --

19 THE COURT: I mean you suggest that her rights under  
20 the 14th Amendment are or would be diminished by a stay  
21 because the officers involved and the city itself wouldn't be  
22 called through the evidentiary process to account for what  
23 may have happened here, so my question is if that's a  
24 concern, why not just allow that to proceed but with the idea  
25 that the collection on the judgment, just like the collection

1 on all the other debts of all the other creditors in this  
2 case, needs to wait for a confirmed plan?

3 MR. GOODMAN: My response to that is that possibly  
4 that is a very partial solution to the issues I've raised,  
5 but in a broader context, there's still -- Mrs. Ryan still  
6 has a claim against the Canton defendants, and as I think I  
7 mentioned --

8 THE COURT: They're not stayed, are they?

9 MR. GOODMAN: No, they are not stayed, absolutely  
10 not. However, one of the things -- I address this in my  
11 reply, and I filed it late yesterday afternoon, and I  
12 apologize if it did not get to the Court in time to review  
13 it.

14 THE COURT: Oh, no. We got it. We read it.

15 MR. GOODMAN: Well, what I said there in response to  
16 that is that there is an additional interest here, which is  
17 the interest of -- there are conflicts between these  
18 defendants. There are who's telling -- you know, who's  
19 telling the --

20 THE COURT: Right.

21 MR. GOODMAN: -- truth, things like that, that can  
22 best be resolved by having it heard in one forum, format, and  
23 so on.

24 THE COURT: Um-hmm.

25 MR. GOODMAN: And -- well, I've already -- the Court

1 is not --

2 THE COURT: This solution would address that concern  
3 as well, wouldn't it?

4 MR. GOODMAN: I suppose that it would. I suppose  
5 that it would address that concern. Whether -- let me put it  
6 this way. I would accede to the Court's suggestion in this  
7 regard, if it is a suggestion, but not give up the  
8 opportunity to subsequently argue in the -- in light of a  
9 verdict at some point that we are entitled to immediately --

10 THE COURT: Well, let me ask you about that. Is  
11 there any case law that holds that the imposition of an  
12 automatic stay violates the 14th Amendment when it delays  
13 collection on a valid constitutional claim such as you assert  
14 you have here?

15 MR. GOODMAN: As the Court may know, I've practiced  
16 law for almost 50 years. I have very little familiarity with  
17 this particular area of the law. However, I have not been  
18 able to find any such case.

19 THE COURT: Okay. Anything further, sir?

20 MR. GOODMAN: I don't have anything further at this  
21 time, your Honor. Thank you.

22 THE COURT: All right. Let me hear from the city  
23 then.

24 MR. CARLSON: Your Honor, Eric Carlson from Miller  
25 Canfield on behalf of the City of Detroit.

1 THE COURT: Sir.

2 MR. CARLSON: I, likewise, will be brief because I  
3 know the Court has read the papers, but I would like to take  
4 the opportunity to do three things. I'd like to highlight a  
5 few things in our objection, respond to the reply that was  
6 filed late yesterday on a couple items, and then spend a  
7 brief moment replying to some of the oral arguments that were  
8 made.

9 As we highlighted in our objection, the automatic  
10 stay is one of the fundamental principles and protections  
11 afforded by bankruptcy. It's key to give the city a  
12 breathing spell, to give them the opportunity to try and put  
13 together a plan of adjustment. The city right now is engaged  
14 in a significant number of activities, including eligibility  
15 and discovery process that's on a very tight timeline, as the  
16 Court knows.

17 THE COURT: Well, let's pause there --

18 MR. CARLSON: Sure.

19 THE COURT: -- and ask whether it's the same  
20 attorneys who are dealing with that tight time frame as would  
21 be dealing with Ms. Ryan's claims --

22 MR. CARLSON: You know, I don't know the --

23 THE COURT: -- under the impression -- and correct  
24 me if I'm wrong -- that it was corporate counsel's -- or  
25 corporation counsel's office who would be dealing with a

1 personal injury claim or a constitutional claim like this  
2 one.

3 MR. CARLSON: That could be to some degree true;  
4 however, your Honor, as you well know probably in discovery  
5 proceedings, it's the city and its in-house counsel that has  
6 the vast knowledge and resources to be able to gather  
7 discovery information and provide it to corporate counsel  
8 upon, you know, the need, so even if there is limited  
9 overlap, there is clearly overlap, and there is  
10 responsibility being had by in-house counsel with respect to  
11 these issues. And the distraction --

12 THE COURT: Is it your representation to the Court  
13 that the individual or individuals who would be assigned to  
14 shepherd the city's defense of this injury claim, this  
15 constitutional claim, through trial would have  
16 responsibilities in this Chapter 9 proceeding?

17 MR. CARLSON: I can't answer that directly, your  
18 Honor. I haven't asked my -- I haven't asked my client that  
19 question, but I would assume for logical reasons that there  
20 are individuals that would be involved in this case who also  
21 are being asked questions on a daily basis. For instance,  
22 okay, this is Number 12, I think, of the relief from stay  
23 motions. I know I relied on this individual to defend this  
24 action. No doubt there are other actions in this bankruptcy  
25 that are coming that this individual would be asked to opine



1 on and help assist with.

2 THE COURT: Okay.

3 MR. CARLSON: Tragic set of facts, your Honor, very  
4 sad, but with all due respect to opposing counsel, that's not  
5 the issue. The issue for this Court to consider is cause.  
6 Cause is defined in this jurisdiction or at least outlined by  
7 five factors that the Court is to consider, and the facts and  
8 the merits of the case are but one factor. There are other  
9 factors to consider, and as the Plastech Court stated, the  
10 overall decision that this Court has to make is a weight of  
11 the hardships between the two parties with the eye on the  
12 overall goal of the Bankruptcy Code. And I would submit that  
13 at this premature or very early stage in this proceeding, the  
14 hardship on the city outweighs the hardship on the plaintiff.  
15 That said, the stay doesn't deny her her claims. The stay  
16 doesn't prohibit the claims. The stay doesn't terminate the  
17 claims. It just stays the claims. And at a future date  
18 maybe there's a -- maybe there's justification to liquidate  
19 it in the state court. That's not the point.

20 THE COURT: When is that?

21 MR. CARLSON: I would submit, your Honor, that, at a  
22 minimum, it would be after eligibility is determined, and  
23 more likely and more logical, it would be after some sort of  
24 claims resolution process has been put forth and agreed upon  
25 because this is one of --

1 THE COURT: All right. Let's talk about that.

2 MR. CARLSON: Okay.

3 THE COURT: I asked in our initial status conference  
4 way back when what the city's plan was to deal with tort  
5 claims, and I'm going to just sort of generically include  
6 this kind of a claim within that category. Didn't really get  
7 an answer, and I want to ask it again. This case is only one  
8 of --

9 MR. CARLSON: 700.

10 THE COURT: -- hundreds.

11 MR. CARLSON: Um-hmm.

12 THE COURT: What's the plan?

13 MR. CARLSON: My understanding is it's being worked  
14 along with everything else in this case right now and will be  
15 set forth in a short period of time. I can't speak directly  
16 to exactly what the plan is right now because I'm personally  
17 not involved in that process; however --

18 THE COURT: Go ahead and take your time and consult  
19 because I want an answer to this question.

20 MR. CARLSON: My colleague's comment, your Honor, is  
21 that there will be a process proposed after a claims bar date  
22 is set, and part of the process would be to suggest engaging  
23 in mediation prior to moving these claims further in  
24 litigation, which obviously would save potential time and  
25 costs.

1 THE COURT: Ms. Lennox, any idea what the city's  
2 intentions are in regard to a claims bar date?

3 MS. LENNOX: Your Honor, as your Honor might know --  
4 oh, I'm sorry. For the record, Heather Lennox of Jones Day.  
5 Earlier this week, we just filed the amended list of the  
6 claims with the amounts, which was very crucial, and it took  
7 a lot of time getting through the city's system with that, so  
8 now that that is filed, we are working on a bar date motion.  
9 We would expect to have it filed promptly, hopefully for  
10 hearing in October or late November, and then normally we  
11 would ask for like a 60-day --

12 THE COURT: October or early November?

13 MS. LENNOX: That would be fine, your Honor,  
14 certainly. We can do that. And normally we'd like to give  
15 folks like 60 days, at a minimum, or whatever the Court might  
16 think, certainly 30 at a -- 30 days at a minimum to 60 days  
17 to get their claims on file, and then the debtor would have  
18 to kind of go through them a little bit and then start the  
19 process, so that's kind of our general timing that we've been  
20 thinking about, your Honor.

21 THE COURT: Thank you. So, Mr. Carlson, apart from  
22 what you've already said on the record about counsel's  
23 potential involvement in both this case and other cases and  
24 the Chapter 9, what other prejudice would there be to the  
25 city if the Court granted relief from the stay for purposes

1 of liquidating this claim but not collecting on it?

2 MR. CARLSON: A significant amount of time and  
3 effort, your Honor. Although this case may be ready for  
4 trial, by opposing counsel's own admission, it involves a  
5 highly complex area of the law. There have been numerous  
6 depositions. I think he said less -- you know, just shy of  
7 30 -- significant discovery, motions for sanctions in the  
8 underlying case, I mean a significant contested -- highly  
9 contested case. And the time and energy on the city combined  
10 with the costs associated with both representing the city and  
11 indemnifying the individual defendants, which is another  
12 issue in this motion -- the city is obligated to indemnify  
13 and defend those individual defendants -- it is a -- I would  
14 submit a major distraction, and as the Court has already  
15 mentioned, it's one of 700, so, you know, the question, I  
16 guess, I would ask at this point without having a claims  
17 procedure process in place is why this one, why now. It's  
18 not -- it's just not the right time, your Honor.

19 Then briefly I'd like to just respond if I could to  
20 a couple of things in the reply real quickly, and then I'll  
21 address the oral argument. With respect, real briefly, to  
22 the due process argument, your Honor, we did cite to the St.  
23 Vincent case in which the Court has ruled on --

24 THE COURT: Before we move on, I have to ask on this  
25 issue of prejudice that you have identified -- and I respect

1 the fact that this is only one of several hundred,

2 MR. CARLSON: Sure.

3 THE COURT: Apart from your statements on the record  
4 here, is there any affidavit that I've missed from the city  
5 that details or specifies this prejudice that you assert?

6 MR. CARLSON: The hardships that would be imposed  
7 upon the city?

8 THE COURT: Yes.

9 MR. CARLSON: Not attached to the papers, no, your  
10 Honor.

11 THE COURT: Or filed at all?

12 MR. CARLSON: There have been numerous motions and  
13 numerous objections, so whether there have been in other  
14 objections I can't confirm or deny.

15 THE COURT: All right. Go ahead.

16 MR. CARLSON: With respect to the reply, your Honor,  
17 real briefly, again, I highlighted earlier and I just wanted  
18 to highlight again because it is an issue that was raised by  
19 the motions, the city isn't -- the city is obligated to  
20 indemnify and defend the individual defendants. We believe  
21 that the extension stay order, Docket Number 166, clearly  
22 addresses and covers nonofficer employees, so the combination  
23 of the indemnification as well as the extension stay order  
24 clearly means that those proceedings against those  
25 individuals should not go forward as well.

1           And with that, your Honor, you know, I think our  
2 position would be that, again, the motion should be denied,  
3 and at this point it's just too early in the proceeding.

4           THE COURT: Any reply, sir?

5           MR. GOODMAN: Just briefly. While it's true that  
6 there are -- I have no reason to disagree with 700  
7 outstanding cases, and many of them, I'm sure, are just,  
8 worthy, and in need of compensation and redress -- there is a  
9 difference analytically in our argument between cases which  
10 raise issues under the United States Constitution and the  
11 Civil Rights Act of 1871 and common law tort cases, and --

12           THE COURT: Well, but isn't it true that many of the  
13 1983 actions are among those that are filed in this District  
14 Court?

15           MR. GOODMAN: I'm sure that's true and in state  
16 court as well, and I'm sure that there are many, although I  
17 don't know the number because I don't have access to that,  
18 and all we've gotten is a gross numerical accounting, and I  
19 do think there's a difference. That's the only point I would  
20 like to make.

21           THE COURT: Right.

22           MR. GOODMAN: With regard to the Court's inquiry  
23 regarding -- or information that was provided to the Court  
24 regarding mediation, I understand that a mediation process in  
25 this Court might be somewhat different. However, this case

1 has already been mediated through -- by a magistrate in this  
2 district, and the city's position was that notwithstanding --

3 THE COURT: Well, all you need say is that the  
4 mediation was not successful.

5 MR. GOODMAN: Well, I'm not going to talk about a  
6 number here. I'm simply going to say that their position was  
7 there would be no offers made until their motion for summary  
8 judgment was decided, and that, of course, goes to the heart  
9 of what we've tried to assert here today in court, so that  
10 was all I was trying to bring to the Court's attention.  
11 Thank you very much.

12 THE COURT: All right. Thank you. All right. I'm  
13 going to take this under advisement and issue a written  
14 opinion shortly.

15 The next motion I'd like to hear, if it's okay with  
16 everyone, is the motion for relief from stay filed by AFSCME,  
17 please. Is that okay with everybody?

18 MS. LEVINE: Good morning, your Honor. Sharon  
19 Levine, Lowenstein Sandler, for AFSCME, the American  
20 Federation of State, County and Municipal Employees, and Sub-  
21 Chapter 98. Your Honor, I want to clarify what may be a  
22 little bit ambiguous in paragraph 22 of our motion. All we  
23 seek here today -- all we seek here today is to let the  
24 administrative law judge sign his opinion, if he determines  
25 to sign his opinion, before he retires on Friday, so we're

1 not asking the city to do anything further. We're not asking  
2 this Court to do anything further. We're not doing anything  
3 further. We understand that there's a claims reconciliation  
4 process that is going to be teed up and heard by the Court in  
5 due course. We understand that with regard to the  
6 eligibility issues and what's going on there, a lot of people  
7 are drinking from a fire hose right now, but we don't want to  
8 lose this window of opportunity to have the administrative  
9 law judge, who has spent a year and a half with this matter,  
10 to at least ink his opinion, and then whatever your Honor  
11 determines is appropriate from that, including if your Honor  
12 determines nothing is appropriate from that, we would be back  
13 before this Court on that issue.

14 THE COURT: Okay. So, again, just to clarify here,  
15 if your motion is granted, what impact would that have on the  
16 timing and the deadlines associated with what would normally  
17 happen in that context if the bankruptcy weren't filed?

18 MS. LEVINE: Your Honor, our understanding is that  
19 because the automatic stay -- and perhaps your Honor's order  
20 could then address this directly, but our understanding is  
21 that the automatic stay would toll those deadlines for that  
22 period of time that the stay was imposed under 108, but if  
23 we're wrong about that, your Honor could address that in the  
24 order as well.

25 THE COURT: You think I have the authority to do



1 that?

2 MS. LEVINE: Your Honor, I think that -- your Honor,  
3 I do believe that under the Bankruptcy Code there is a  
4 tolling once the automatic stay is in place under Bankruptcy  
5 Code Section 108, and I think that your Honor would have the  
6 authority to do that, but the -- but more importantly, I'm  
7 not sure that anybody is even suggesting that we go back at  
8 this point in time to the MERC or to any other administrative  
9 proceeding. Really our understanding is is that the  
10 administrative law judge, as part of this decision, could, if  
11 he decides, issue a damage award or at least designate a  
12 suggested damage award, and given all that's gone on in front  
13 of him, that at some point in time in this case might prove  
14 of value to the parties here.

15 THE COURT: How much in damages -- excuse me -- is  
16 your client seeking?

17 MS. LEVINE: Your Honor, I don't recall the numbers,  
18 but it's a substantial -- it's a substantial amount. I don't  
19 have all of the -- I'm not sure that we want --

20 THE COURT: Approximately.

21 MS. LEVINE: I'm not sure actually that we want to  
22 put a number on the record here. You know, that's part of  
23 that proceeding, and we're not ready to pre-try that issue,  
24 but to the extent that he inks a number, it would be a number  
25 that would then come back and get treated here or to the --

1 THE COURT: I thought you had filed a paper with a  
2 number in it, and I just couldn't remember what the number  
3 was.

4 MS. LEVINE: Your Honor, I don't mean to be hedging,  
5 but my understanding is -- and I'm new to this whole  
6 process -- is that it's based upon the percentage of  
7 investments, and we gave a range, and that's part of the  
8 reason actually why we're looking for the administrative law  
9 judge's guidance to the extent he wants to give it.

10 THE COURT: And what was the range?

11 MS. LEVINE: Our range was different, your Honor,  
12 than the debtor's. What was the debtor's -- your Honor, if I  
13 can introduce to the Court my co-counsel.

14 THE COURT: Sure. Sir.

15 MR. MACK: Richard Mack, your Honor.

16 THE COURT: Richard --

17 MR. MACK: Richard Mack, M-a-c-k.

18 THE COURT: Yes. Okay.

19 MR. MACK: I'm the attorney who tried that  
20 litigation.

21 THE COURT: Yes.

22 MR. MACK: The complication in just identifying a  
23 number for your Honor is that it was based upon what were  
24 determined to be excess earnings beyond the pension fund's  
25 performance in the market, so if the pension fund performed

1 beyond 7.9 --

2 THE COURT: Right.

3 MR. MACK: -- percent in the market, then that money  
4 was to be distributed three ways, as laid out --

5 THE COURT: Right.

6 MR. MACK: -- in our supplemental pleadings, so  
7 obviously it would depend on this precise investment in the  
8 market in the two years at issue here, 2011, 2012, and then  
9 one of the ways that we've suggested as a means of obtaining  
10 a damage award to the ALJ is assigning an average to that,  
11 so --

12 THE COURT: Yeah. You were going to go back ten  
13 years, do an average.

14 MR. MACK: Yes. We cited case law.

15 THE COURT: So what was your range?

16 MR. MACK: Well, the percentage is -- I believe it  
17 was 54 percent of the excess earnings went to -- again, it  
18 depends on the performance in the market in 2011, 2012. I  
19 simply don't have the number. I think the 2011 year was 18-  
20 percent performance in the market. 2012 was -- I think was  
21 20-percent performance in the market. So you would take the  
22 percentages above 7.9 for those two years and then divvy up  
23 that excess earnings those three ways, so --

24 THE COURT: Forgive me for not remembering, but did  
25 your paper that you filed with the ALJ not calculate all of

1 that and come to a bottom line request? I thought it did.

2 MR. MACK: We came to a bottom line request on the  
3 percentages.

4 THE COURT: Right. What was it?

5 MR. MACK: On the percentages.

6 THE COURT: Oh, on the percentage.

7 MR. MACK: Yes.

8 THE COURT: Not on the amount.

9 MR. MACK: No.

10 THE COURT: All right.

11 MR. MACK: Not on the amount.

12 THE COURT: Well, then I won't pin you down any  
13 further. Thank you, sir.

14 MS. LEVINE: Sorry, your Honor, that we don't have a  
15 definitive number. I was hoping maybe it was just outside  
16 what I --

17 THE COURT: In any event, you're not seeking  
18 collection of that now. That's what you're telling the Court  
19 and the city.

20 MS. LEVINE: Your Honor, we're actually seeking less  
21 than not even seeking collection of that now. In other  
22 words, my understanding is that once the AL -- once the  
23 administrative law judge inks his decision, there's potential  
24 for supplemental proceedings outside of this Court's  
25 jurisdiction that might further impact that number. We're

1 not even asking for that and haven't made any decision, and  
2 we're assuming that the state hasn't made any -- and the city  
3 hasn't made any decision about any further proceedings  
4 either. Literally we just became aware that the  
5 administrative law judge was retiring on Friday, and we're  
6 just seeking stay relief till Saturday so that if, in fact,  
7 he's inclined to issue this opinion, for whatever we all  
8 determine it's worth at a later date, we don't lose the  
9 benefit of giving him that opportunity.

10 THE COURT: Though you're not even sure it's going  
11 to happen.

12 MS. LEVINE: No. I wouldn't presume to know exactly  
13 what the judge will or will not want to do, but I -- but we  
14 do understand that this Court -- this case was filed right as  
15 he was at the point in that process where we ordinarily would  
16 have expected that the opinion would have been issued.

17 THE COURT: Assuming the opinion is issued and it's  
18 consistent with his oral opinion a few months back, what  
19 impact would that have or could that have on any ongoing  
20 obligation of the city?

21 MS. LEVINE: Your Honor, our -- your Honor, we  
22 suspect it depends what happens after the Chapter 9 and what  
23 happens in the plan of adjustment. In other words, once we  
24 all have that knowledge in front of us, we'll be able to  
25 react to it, but most importantly, what we --

1           THE COURT: Well, let me be more specific. Will it  
2 be your client's position that following the close of this  
3 2013 calendar year, the city will have an obligation  
4 consistent with what the ALJ has proposed in his oral  
5 decision and presumably will memorialize in his written  
6 decision?

7           MS. LEVINE: The answer is, your Honor, that was the  
8 position that we took in connection with that litigation.  
9 Obviously this is just a recommendation, and then it would go  
10 back through a process, and all that is predicated on the  
11 fact that obviously it's our view that the pensions can't be  
12 adjusted during this proceeding, but, you know, we have yet  
13 to see what will come out of the plan of adjustment process,  
14 but we're not here waiving any rights with regard to  
15 prospective rights, especially prospective rights that we  
16 would have had had the stay not been lifted and the  
17 administrative law judge not retired. In other words, our --  
18 you know, our expectation is that all we're really looking to  
19 do here is take a snapshot of a particular piece of  
20 information that may become useful at a future point in time  
21 simply because we're not going to have it available to us at  
22 that future point in time.

23           THE COURT: Well, if there's no reason to believe  
24 that the written opinion will vary in any significant respect  
25 either in terms of result or rationale from what the judge

1 said on the record, why do you need the written opinion?

2 MS. LEVINE: Two reasons, your Honor. Number one,  
3 we don't know that for a fact. He has the ability to  
4 reconsider whatever it is he would like to reconsider as part  
5 of issuing that written opinion, so that could be useful to  
6 know. And, number two, with the supplemental filings, it's  
7 my understanding -- and I'm admitting I'm an onlooker as  
8 well, but with the supplemental filings, it's possible that  
9 we get more clarity with regard to the dollar amount of  
10 awards that could be useful or probative should we determine  
11 to use them in connection with claims reconciliation and  
12 other issues in this case.

13 THE COURT: The union's underlying claim here was  
14 that the city was required to but failed to negotiate this  
15 issue. Yes?

16 MS. LEVINE: Yes, in part, your Honor, and that --  
17 but that there was also damages that flowed from that.

18 THE COURT: Are you, by which, of course, I mean the  
19 union -- is the union and the city still obligated by law to  
20 negotiate this issue?

21 MS. LEVINE: Your Honor, we would hope so, but part  
22 of what we're working through in the mediation --

23 THE COURT: What is your position on whether the law  
24 requires negotiation of this issue?

25 MS. LEVINE: We believe that the law does require

1 negotiation of this issue, your Honor, but that is,  
2 frankly --

3 THE COURT: And so you fully intend to still do  
4 that?

5 MS. LEVINE: On a go-forward basis? Depends upon  
6 what kind of stay relief we would get, and we're not asking  
7 your Honor to address that issue now.

8 THE COURT: Well, for example, as part of the claims  
9 resolution process.

10 MS. LEVINE: Well, that's beyond the scope of what  
11 we're looking for today. In other words, it's --

12 THE COURT: I want your assurance that if the law  
13 requires you to negotiate this, you'll do that.

14 MS. LEVINE: We would be happy to do that, your  
15 Honor.

16 THE COURT: Excellent.

17 MS. LEVINE: I thought that you were -- I didn't  
18 want to go beyond what your -- what we were asking for in  
19 terms of the relief.

20 THE COURT: I get that. I feel compelled to ask one  
21 more question here, and if you want to defer to Mr. Mack,  
22 feel free. Was there anything in writing anywhere, in a  
23 contract, in the pension documents, in a city ordinance, in  
24 the city charter, that explicitly authorized the pension  
25 trustees to make these so-called 13th payments?



1 MR. MACK: Mr. Mack again, your Honor. Yes. Our  
2 position was that both in the city charter as well as in the  
3 contract itself as well as the --

4 THE COURT: What was the language in them that  
5 authorized this?

6 MR. MACK: It's part of the pleadings, your Honor.  
7 If you want, I can take a moment and --

8 THE COURT: Just summarize.

9 MR. MACK: It essentially gave the board discretion  
10 to establish payments as it saw fit beyond a certain level of  
11 estimated earnings in the pension investment system, so what  
12 would happen is each year an actuary --

13 THE COURT: I know what happened. That wasn't my  
14 question. My question was what authorized what happened.

15 MR. MACK: Yes. The charter and the contract.

16 THE COURT: All right. Thank you, sir. Are you all  
17 set?

18 MS. LEVINE: Thank you, your Honor.

19 THE COURT: Okay.

20 MS. LENNOX: Good morning, your Honor. Again,  
21 Heather Lennox of Jones Day for the city, for the record. At  
22 first blush, your Honor, this request -- the request that's  
23 posed in AFSCME's motion does seem pretty innocuous, but upon  
24 further reflection and upon further analysis of the city, we  
25 think it has very far-reaching implications for this case and



1 in this case that we think ultimately should be resolved by  
2 this Court.

3 Now, one could take the counter-argument and say,  
4 well, look, the administrative law judge heard argument on  
5 this issue seven and a half months ago, why not just let him  
6 commit it to paper, and maybe it could help the Court decide  
7 this issue. Here's why not. The hearing on this issue  
8 before the administrative law judge was in February of 2013.  
9 That was a full month before the emergency manager was  
10 appointed for the city. Since that time, several other  
11 relevant things have happened. The collective bargaining  
12 agreement has expired. The Michigan Supreme Court has  
13 reversed a decision relied on by the administrative law  
14 judge. The parties have been permitted several months after  
15 that hearing to file additional briefs on which no hearing  
16 has been held, and this is important because both parties in  
17 their briefs -- and those briefs were attached as exhibits to  
18 our objection, your Honor -- both parties recognized the  
19 changes in circumstances and the changes in the law since  
20 that hearing. In its paper, AFSCME argues for brand new  
21 remedies that are inconsistent with past practices because it  
22 feared -- and it states this openly -- it feared what an  
23 emergency manager might do to affect its claim. The city  
24 pointed out that the Michigan Supreme Court reversed the key  
25 case that was relied on by the administrative law judge, so

1 it is clear from the papers themselves, your Honor, that  
2 neither party would view what the administrative law judge  
3 must do here or what is being requested by this relief as  
4 simply memorializing what happened and what he said on --  
5 February 2013. AFSCME is arguing for new claim relief, and  
6 the city has new legal arguments. This would have to be a  
7 new ruling on new facts with new law without the benefit of a  
8 hearing plus, your Honor, I would say that the Michigan  
9 Supreme Court's decision in Macomb County versus AFSCME calls  
10 into doubt whether the administrative law judge even has  
11 jurisdiction or is the proper forum for hearing and resolving  
12 this matter.

13 If AFSCME wants to assert and liquidate its claim  
14 against the city, we believe it should do so in this forum  
15 and in this Court because perhaps the most important thing  
16 that has changed since February 2013 is that the city has now  
17 filed a Chapter 9 case, but we don't even need to decide this  
18 issue today. The request in the motion, as Ms. Levine  
19 pointed out, is narrow. It is for relief from the stay for  
20 the administrative law judge to issue a recommendation.

21 I just enumerated a host of reasons why that  
22 shouldn't happen, and I can add another. That  
23 recommendation, if issued, doesn't fully or finally resolve  
24 anything, which is one of the factors that the Court should  
25 consider when seeking to lift the stay. Exemptions and

1 cross-exemptions could be filed to the MERC. It may even be  
2 dismissed because that may be an improper forum for hearing  
3 the matter, so there is no full resolution that can happen.  
4 If AFSCME has a claim, it will still be out there, and they  
5 can still assert it in this Court or if your Honor should  
6 decide at some point some other forum, but we believe it  
7 should be this Court. They will not be harmed one whit by  
8 the maintenance of the stay, but this relief, if there's --  
9 if there's something that is definitive and if something  
10 becomes binding, it's exceedingly far-reaching for the city,  
11 and it goes beyond relief for AFSCME, it would apply -- the  
12 reasoning of it certainly would apply to all of the unions  
13 and all of the pension plans, so we think, your Honor, while  
14 the relief does appear innocuous, it is ill-advised, and we  
15 think the Court should deny the motion.

16 THE COURT: Well, if this limited stay relief is  
17 granted and the deadlines for subsequent action, whatever  
18 that might be, are tolled, how would the city be prejudiced?

19 MS. LENNOX: I think it would be prejudiced -- well,  
20 again, our position is is that he can't rule. He's got new  
21 facts, new laws, no hearing.

22 THE COURT: Is that for me to decide, or is that for  
23 him to decide?

24 MS. LENNOX: I think -- as a matter of due process,  
25 I think it would be important for the city to have a new

1 hearing, and, frankly, his retirement is of no moment. There  
2 can be another administrative law judge to pick this up and  
3 have that hearing.

4 THE COURT: But, again, I ask you is that for him to  
5 decide, or is that for me to decide?

6 MS. LENNOX: Well, I think in the first -- I don't  
7 think you have to decide that question, per se, your Honor,  
8 but what you're being asked to do is to lift the stay to  
9 allow something to happen, something that we don't know as we  
10 all sit here in the courtroom here, if the stay is lifted,  
11 what will happen. Will that decision that was issued on the  
12 record in February simply be committed to paper, and, if so,  
13 what happens with the subsequent facts and briefing? Will  
14 those be taken into account? Will they not? Will we have to  
15 have another proceeding in front of another administrative  
16 law judge to untangle that later? We don't know as we stand  
17 here today because you're right, that is not for anybody in  
18 this courtroom to figure out, but lifting the stay could set  
19 those activities in motion.

20 THE COURT: Well, but that wouldn't happen if the  
21 relief from the stay were as limited as Ms. Levine asks for  
22 here.

23 MS. LENNOX: If the relief -- what we don't know as  
24 we stand here today is what would happen if the relief, as  
25 limited as Ms. Levine asks for, happens. We don't know

1 whether Administrative Law Judge O'Connor would simply write  
2 down on a piece of paper that which is already contained in  
3 the transcript. If he would consider further the papers that  
4 have been filed and the subsequent facts, in which case he  
5 would have done so without a hearing, we just don't know  
6 that.

7 THE COURT: All right. Thank you.

8 MS. LEVINE: Your Honor, just briefly.

9 THE COURT: Yes.

10 MS. LEVINE: Your Honor, we'd respectfully submit  
11 actually for the whole litany of issues that were just raised  
12 by the debtor that the limited stay relief is more  
13 compelling, not less compelling, especially if the tolling  
14 applies, and we would confirm right now that we would consent  
15 to tolling to the extent that's an issue, and the debtor can  
16 consent on the other side.

17 This administrative law judge has had this in front  
18 of him for a year and a half. He's had the hearings. He's  
19 had the briefing. And we're assuming that in his mind he has  
20 something that he wants to do, which may, in fact, be nothing  
21 because that, in effect, is something for these purposes.  
22 What we don't want to do is lose that, and if we -- and if we  
23 have this limited relief, come Monday we'll all know what  
24 that is. And some appropriate time in the future, we can  
25 decide if or when or how that something should be utilized by

1 this Court, if at all, but if we don't let this judge, you  
2 know, do what it is he feels appropriate here with the  
3 deliberation and the time and the effort and the judicial  
4 resources that he has already expended on this matter, it's  
5 potentially disadvantageous to all of us in this process.

6 THE COURT: Do I understand correctly that the  
7 process is that this administrative law judge simply proposes  
8 a recommended order or judgment, whatever it's called --

9 MS. LEVINE: I'm shaking my head, for the record.

10 THE COURT: -- to the Michigan --

11 MS. LEVINE: Yes.

12 THE COURT: I'm sorry.

13 MS. LEVINE: I was shaking my head. The answer is  
14 yes. He issues a recommendation. It's not a --

15 THE COURT: To the Michigan Employment --

16 MS. LEVINE: Yes.

17 THE COURT: -- Commission.

18 MS. LEVINE: Yes. And we're not asking for  
19 proceedings before the MERC, the Michigan Employment  
20 Commission. We're just asking that this judge be able to do  
21 whatever it is he would feel appropriate between now and his  
22 retirement on Friday.

23 THE COURT: So as a recommendation, does it have --  
24 if that's all that came out of this relief from stay, would  
25 that have any binding effect on anyone?



1 MS. LEVINE: Your Honor, our understanding -- and my  
2 co-counsel can correct me if I'm wrong, but my understanding  
3 is that it's an issue that could be considered de novo by the  
4 MERC but that it is something that is useful for the MERC to  
5 have when it makes those deliberations. We respectfully  
6 submit that if it comes here, as the potentially now  
7 appropriate Court, that it could be useful here as well.

8 THE COURT: Again, a process question about MERC  
9 that you could feel free to defer to Mr. Mack, but how do you  
10 deal with the city's argument -- or at this point it's just a  
11 concern -- that because of this Michigan Supreme Court  
12 decision from Macomb County in the meantime, there may not  
13 even be jurisdiction?

14 MS. LEVINE: Your Honor, we're dealing with  
15 jurisdictional issues here as well. That doesn't mean that  
16 at the appropriate time by the appropriate tribunal having  
17 this piece of paper signed between now and Friday wouldn't  
18 help. If it turns out that he lacked jurisdiction or that  
19 the decision should not be considered, that's fine, but if  
20 we're wrong about that, then we've lost this window of  
21 opportunity.

22 THE COURT: Did you want to add something to that,  
23 sir?

24 MR. MACK: If you wish.

25 THE COURT: No. It's up to you.

MS. DEEBY: Yes, please. For the record, your Honor, Shannon Deeby of Clark Hill. I represent both the General Retirement System of the City of Detroit and the Police and Fire Retirement System of the City of Detroit. For today's purposes, we're just addressing the issues related to the GRS. What we would say, your Honor, is that to the extent that AFSCME's motion is seeking very limited relief enabling it to liquidate a damage claim or a damage amount, we would not oppose the motion. However, if, as the city suggests in their responsive pleadings and as were raised apparently in the supplemental briefing filed by AFSCME that they were requesting a recommendation that the board be reconstituted as of 2011, 2012, we would oppose any

1 kind of impact on board composition, board governance, or the  
2 governance of the systems. We think it would be wholly  
3 inappropriate.

4 THE COURT: What's your client's position, since you  
5 have stood up here, on whether the Retirement Systems  
6 distribution of this 13th check for all these decades was  
7 legal?

8 MS. DEEBY: As I understand it, your Honor, the  
9 board acted completely within their discretion pursuant to  
10 the governing laws and their contracts.

11 THE COURT: All right. Thank you. Because of the  
12 urgency of this, I want to give you a decision today, so I'll  
13 commit to do that, say, 30 minutes after the conclusion of  
14 the next hearing --

15 MS. LEVINE: Thank you.

16 THE COURT: -- on the record here.

17 MS. LEVINE: Thank you very much.

18 MR. MACK: Thank you, your Honor.

19 MS. LEVINE: Your Honor, with the Court's  
20 permission, there's court-ordered mediation that I'm supposed  
21 to be in downstairs. May I be excused pending coming back to  
22 hear the decision?

23 THE COURT: Of course.

24 MS. LENNOX: Your Honor, I might make that same  
25 request. I'm supposed to --

1 THE COURT: Of course. Go.

2 MS. LENNOX: Is there a particular time your Honor  
3 would like us back in the courtroom?

4 THE COURT: That would be easier for you, wouldn't  
5 it? All right. Let's just pin a time on it, and let's say  
6 one o'clock.

7 MS. LENNOX: One. Thank you, your Honor.

8 MS. LEVINE: Thank you.

9 THE COURT: The final matter on the Court's docket  
10 today is the motion for relief from stay filed by the NAACP.

11 MR. HOLLOWELL: Good morning, your Honor.

12 THE COURT: And you may proceed.

13 MR. HOLLOWELL: Thank you, Judge. Melvin Hollowell,  
14 general counsel on behalf of the NAACP, and my co-counsel  
15 here, Nabih Ayad, as well, and we'll address a couple issues  
16 for you this morning. Good morning, Judge.

17 THE COURT: Yes, sir. Go ahead.

18 MR. HOLLOWELL: Again, this is our request of relief  
19 from extension of the stay entered by the Court, and first I  
20 wanted to deal with just the substance, if I could, just very  
21 briefly, of our case that, you know, the case is -- it's not  
22 about debtor-creditor issues. It's about voting rights. And  
23 Public Act 436, the emergency manager law, creates, in our  
24 view, two classes of voters. I guess it's best put in a  
25 nutshell. It creates a superior class of voters where votes

1 for elected officials and those elected have full powers and  
2 duties and an inferior class of voters where you can vote,  
3 but your vote doesn't have the full authority that it should.  
4 And these separate and unequal classes of voters violates the  
5 14th Amendment, and we've cited in our brief Bush versus Gore  
6 and the doctrine of equal dignity of each vote in Headnote 4.

7 It constitutes a fundamental and irreparable harm,  
8 as we demonstrated in our pleadings, that now since the law  
9 has gone into effect, over 50 percent, 50.4 percent to be  
10 exact, of all African Americans now in the State of Michigan  
11 are under emergency managers versus 1.3 percent of the  
12 state's white population.

13 We further would say that we have long been at this  
14 issue. I think, as this Court knows, Judge, we have fully  
15 litigated the question of whether this should have been on  
16 the ballot. We won that case in front of the Michigan  
17 Supreme Court. As this Court knows, that the voters of this  
18 state voted by 53 percent to reject the emergency manager  
19 law, and yet just five weeks after that it was overturned by  
20 a lame duck session of the Michigan legislature and a new  
21 emergency manager law was put into place.

22 So our view on this is, Judge, that, as the NAACP  
23 has done throughout a hundred years, you know, we look at  
24 questions of equal access to quality education and criminal  
25 justice reform and certainly the rights of voters. Those

1 have been the wheelhouse issues for the NAACP for the better  
2 part of a century, and this case goes directly to that. And,  
3 you know, the language, again, in Public Act 436 is pretty  
4 striking in respect to the evisceration of the powers and  
5 duties of elected officials, so it decapitates them. And so  
6 what you have in the nine jurisdictions that are under  
7 emergency managers, Detroit but one of them, their powers are  
8 advisory, and so they have the authority to meet, but that's  
9 pretty much it. And in our view, that triggers, particularly  
10 with the disparate impact on African American voters, a  
11 fundamental constitutional right to vote, which is preeminent  
12 over all other rights to vote, and I would just draw the  
13 Court's attention to the U.S. Supreme Court's decision in  
14 Reynolds versus Sims where the Court indicated that the right  
15 to exercise the franchise in a free and unimpaired manner is  
16 preservative of all other basic rights.

17 Further, in the Elrod versus Burns case -- and  
18 that's the 427 U.S. at 373 case -- that goes to ongoing  
19 constitutional deprivations, and it says that particularly as  
20 it relates to the right to vote, the loss of constitutionally  
21 protected freedoms for even minimally periods of time  
22 constitutes irreparable injury, quote, unquote. And so our  
23 argument is that not just in the City of Detroit but in all  
24 of the other eight jurisdictions across the State of  
25 Michigan, these constitutional deprivations are ongoing and

1 deserve to be litigated fully and fairly in front of Judge  
2 Steeh where the case has been filed.

3           Second, if I could just briefly issue -- or address  
4 the issue of collateral attack, and notwithstanding the  
5 allegation that this is a collateral attack, this is not a  
6 collateral attack on the Detroit bankruptcy. It's really  
7 a -- it's a direct attack on the constitutionality of Public  
8 Act 436. And, you know, the timeline is very important in  
9 connection with this. I think I talked just a moment ago  
10 about 2011 and how we, you know, certainly gathered petitions  
11 to get this matter in front of the voters in 2011, 2012  
12 litigation, as this Court knows, and about the results of  
13 that, but then as we get into 2013, the March 28 effective  
14 date of the statute and then the emergency manager was  
15 appointed, the NAACP brought its suit on May 13th, and so --  
16 and we amended the complaint on June 27th. And there was  
17 some allegation in the pleadings as to, well, you know, you  
18 amended it, you know, later. The reason we amended the  
19 complaint was because in the interim between May 13th and  
20 June 27th, as this Court I know is aware, the U.S. Supreme  
21 Court decided the Shelby County versus Holder case. We  
22 had -- our case is predicated upon the 14th Amendment. We  
23 have one provision which deals with the Voting Rights Act,  
24 and so we supplemented Section 5 and 4, which was ruled  
25 unconstitutional by the U.S. Supreme Court in the Shelby

1 County case, and substituted Section 3 of the Voting Rights  
2 Act, but the claims, other than that, and the relief sought  
3 was the same. This was the NAACP's filing, therefore, on May  
4 13th was well in advance of the July 18th bankruptcy hearing,  
5 and, furthermore, well before the July 25th Bankruptcy Court  
6 order regarding stay.

7 We did not learn of the extension of the stay until  
8 into August. We were not on the certificate of notice.  
9 Defendants, State of Michigan, certainly should have noticed  
10 us. That was Docket Entry Number 140. We were not on that  
11 certificate. There was no reason for us to know. The first  
12 notice we received was in the U.S. District Court in front of  
13 Judge Steeh. Upon notice we moved expeditiously to ask for  
14 relief from that stay, so it is not, in our view, our burden  
15 here. It, rather, is on the state and the city as it relates  
16 to that as to why we were not noticed. And we certainly  
17 would have liked to have been in front of this Court when  
18 there was the initial argument as it relates to this, but,  
19 again, we were not noticed and not brought in for those  
20 proceedings.

21 And let me just, lastly, address the stay issue  
22 itself, Judge, and I would direct the Court's attention to  
23 Section Roman Numeral III of the city's brief where it talks  
24 about automatic stay and then says in dealing with the -- I  
25 think it's a Javens versus Hazel Park case, the Sixth Circuit



1 case, that the automatic stay, quote, "gives the debtor a  
2 breathing spell from its creditors," gives the debtor a  
3 breathing spell from its creditors. Well, we are not a  
4 creditor. That is not us. We are -- we seek no money  
5 damages. We did not name the city. We did not name --

6 THE COURT: You could have filed an objection to  
7 eligibility.

8 MR. HOLLOWELL: We don't take a position on the  
9 eligibility. Our position is that we should be allowed to  
10 prosecute our case on the constitutional issues, and the city  
11 is free to move forward on its --

12 THE COURT: So your position is there was nothing  
13 about the filing of this case that violated the United States  
14 Constitution. Is that your position?

15 MR. HOLLOWELL: There's nothing about the filing of  
16 this case that violated the --

17 THE COURT: Is that your position, sir?

18 MR. HOLLOWELL: I'm not sure I understand the  
19 question. Our case says that --

20 THE COURT: I need an answer to my question.

21 MR. HOLLOWELL: I'm not sure I understand the  
22 question, Judge.

23 THE COURT: Detroit filed Chapter 9.

24 MR. HOLLOWELL: Yes.

25 THE COURT: Your clients did not file eligibility

1 objections. They could have. They didn't. Is it your  
2 position that there is nothing about this filing, this  
3 Chapter 9 filing, that violated the Constitution?

4 MR. HOLLOWELL: Our position is that we don't take a  
5 position on the Chapter 9 filing. We do not take a position  
6 on the Chapter 9 filing, so our position is --

7 THE COURT: Okay. So whatever argument you could  
8 have made about the constitutionality of this filing you  
9 waived by not filing a timely objection?

10 MR. HOLLOWELL: No. Judge, we would respectfully  
11 say that we were not a party to that case nor were we noticed  
12 in the docket entry as it relates to parties in that case  
13 that the parties in that case, in our view, would have had an  
14 obligation to have given us notice for the opportunity to  
15 present at that hearing. Our belief is that --

16 THE COURT: When you say "that hearing," what  
17 hearing are you referring to because we have not had a  
18 hearing on eligibility yet?

19 MR. HOLLOWELL: The matters in front of the judge,  
20 the previous matters in front of the judge as it relates to  
21 the city's initial filing, and --

22 THE COURT: You're not seriously contending you  
23 weren't aware that the City of Detroit filed bankruptcy?

24 MR. HOLLOWELL: Certainly was. We certainly were,  
25 but we filed before the city filed, Judge. That's the point,

1 and the point is that our case is separate and distinct from  
2 the city's case and that the city --

3 THE COURT: Well, but the question that the city  
4 raises is can it be separate.

5 MR. HOLLOWELL: Yes. That is the question that the  
6 city raises, and we said we see no reason why it cannot be  
7 separate and follow a separate track. Again, it does not --

8 THE COURT: Isn't it the case, though, that the  
9 relief you seek, if granted, would terminate the emergency  
10 manager, yes?

11 MR. HOLLOWELL: Yes.

12 THE COURT: And what impact would that have on this  
13 case?

14 MR. HOLLOWELL: Well, it would be speculative as to  
15 where it would go from there, but certainly the elected mayor  
16 of the City of Detroit certainly would have the powers and  
17 authority to move forward with the bankruptcy if he so chose.  
18 That's the point. Our point is that not just the City of  
19 Detroit but all those other cities have had irreparable harm.  
20 We are in front of Judge Steeh, and we should have the  
21 authority to proceed in front of Judge --

22 THE COURT: Of course, none of your individual  
23 plaintiffs are from any of those other cities, are they?

24 MR. HOLLOWELL: No. The individual plaintiffs  
25 are --

1 THE COURT: This case is about Detroit, isn't it?

2 MR. HOLLOWELL: No. Well, we also have the Michigan  
3 branch of the NAACP, which represents individuals all  
4 throughout the State of Michigan.

5 THE COURT: Right, but none of the members of the  
6 state branch who live in those other cities are named as  
7 plaintiffs; right?

8 MR. HOLLOWELL: The state branch of the NAACP --

9 THE COURT: Am I right about that, sir?

10 MR. HOLLOWELL: Well, if I could say the state  
11 branch represents all NAACP residents throughout the State of  
12 Michigan.

13 THE COURT: Am I right about my question?

14 MR. HOLLOWELL: Well, the individual plaintiffs,  
15 yes. However, if the judge would take a look at the actual  
16 complaint, the complaint is very specific in terms of  
17 alleging the harms in each one of those other cities, so it's  
18 not like it was just about the City of Detroit. It was about  
19 a lot of different cities, not -- eight other cities, to be  
20 specific, and we looked at the individual conduct in each one  
21 of those cities, and we pled that, and we put that in the  
22 complaint. And that has been a part of our pleading from the  
23 very beginning.

24 As I would also say is that -- Judge, that on the  
25 automatic stay issue where it casts uncertainty over the

1 bankruptcy case, we would also argue the reverse, that the  
2 bankruptcy casts uncertainty over the fundamental  
3 constitutional protections which were filed before the  
4 Bankruptcy Court and before bankruptcy and which can and  
5 should be addressed by Judge Steeh, so we would finally say  
6 that we are not litigating or contesting eligibility, which  
7 is what, again, the Garzoni case deals with. And even if it  
8 did apply, again, we were saying that we -- when you look at  
9 particularly the hardship upon other --

10 THE COURT: Okay. So when you say you're not  
11 objecting to eligibility, isn't that same thing as saying you  
12 have waived any objections to eligibility that you might  
13 have?

14 MR. HOLLOWELL: We have not taken any position on  
15 eligibility. As Mr. Goodman said earlier, this is -- our  
16 case is in federal District Court, and we are pursuing our  
17 rights and remedies under the federal District Court, not  
18 under the Bankruptcy Court, and we believe that we should be  
19 allowed to proceed in the Article III court.

20 THE COURT: I'm sorry. I had another question for  
21 you, sir.

22 MR. HOLLOWELL: Oh, yes.

23 THE COURT: Is there any way your lawsuit can be  
24 tailored or permitted to proceed that would not have an  
25 impact on this bankruptcy case?

1 MR. HOLLOWELL: Yes. We don't object to  
2 eligibility. We are not alleging any pecuniary interest.  
3 We're not seeking money damages. There's no claim against  
4 the city. There's no --

5 THE COURT: So if I gave you a period of time to  
6 file an eligibility objection that was based on the claims  
7 you make in your complaint or any other grounds, for that  
8 matter, you wouldn't file that objection?

9 MR. HOLLOWELL: We would not file an objection.

10 THE COURT: All right. Thank you, sir.

11 MR. HOLLOWELL: Thank you, Judge.

12 MR. AYAD: Good morning, Judge. For the record,  
13 Attorney Nabih Ayad on behalf of the NAACP, Stallworth, State  
14 Representative Rashida Tlaib, and the rest of the  
15 complainants in this particular matter. Judge, just to echo  
16 brother counsel, Butch Hollowell's, position that we are not  
17 objecting to eligibility. We are not objecting. And to  
18 answer your -- answer this Court's question, Judge, yes, we  
19 could move forward. We could move forward. You know, what  
20 we were asking in our initial complaint before Judge Steeh,  
21 Judge, was the issue of an injunctive relief, and we're  
22 asking that we could move forward. Everything that's  
23 happened in the past, that's still okay with us, Judge.  
24 We're not contesting eligibility. We're not saying that the  
25 emergency manager did not have the power and authority under

1 PA 436 to file for bankruptcy. We're not contesting that,  
2 Judge. And the powers of this Court and the powers of the  
3 Judge Steeh's court in the District Court has the ability to  
4 say, you know, we're not going to, you know, repurchase Belle  
5 Isle back. We're not going to repurchase certain items back.  
6 We're not going to cut those contracts that we're in and  
7 replace them and everything else. We're saying, Judge,  
8 moving forward, moving forward on this particular -- the  
9 judge could limit it. Your Honor could limit it. So does  
10 the Judge Steeh in the District Court can limit the powers,  
11 let's say, that moving forward on a prospective injunctive  
12 order that PA 436 may be unconstitutional, but what has  
13 already happened we're not going to touch. You know what?  
14 Quite frankly, Judge, we're okay with that. We're more  
15 concerned about the abilities of -- more than half of the  
16 African Americans in this state lack the ability to vote, a  
17 vote fundamental of all fundamental rights across this  
18 country. It is fundamental and basic in our society of fair  
19 play and in a democratic society that we have the right for  
20 individuals to vote, and the Supreme Court of this land, so  
21 has the Sixth Circuit, Judge, spoken about the ability -- the  
22 dilution of the vote even on a much, much lower standard, was  
23 found to be unconstitutional. Here we don't have one  
24 plaintiff, two plaintiffs, a hundred plaintiffs. We have  
25 hundreds of thousands. The majority of African Americans in

1 this state can no longer basically represent -- can no longer  
2 vote for their state -- for their local elections, Judge.

3 THE COURT: Let me just interrupt you there, sir,  
4 and ask you how you deal with the state's argument that  
5 everyone who wanted to vote did vote and their votes counted?

6 MR. AYAD: Judge, I think that would insult the  
7 intelligence of the Court. It would insult my intelligence  
8 as a civil rights attorney, Judge.

9 THE COURT: I need to hear you articulate your  
10 response.

11 MR. AYAD: I'll tell you exactly why, Judge. I can  
12 vote for a bird. Doesn't mean that bird is going to be able  
13 to do anything, Judge. If I vote for my city councilman, has  
14 no powers -- inherent in each vote in the state is the power,  
15 Judge.

16 THE COURT: One second. For technical reasons, I've  
17 been asked to ask you to move like six inches back from the  
18 microphone because --

19 MR. AYAD: I'm sorry.

20 THE COURT: -- what happens is our system gets  
21 overloaded if it's too loud, and then it cuts out, and then  
22 the people in the other rooms can't hear you.

23 MR. AYAD: Well, I definitely want to be heard,  
24 Judge, so --

25 THE COURT: Okay.



1 MR. AYAD: -- I'll back up a little bit. Thank you.  
2 Your Honor, you know, inherent in every vote, it's a  
3 fundamental constitutional -- it defies all sense of logic  
4 that when I vote someone, there is inherent in that vote the  
5 right that I'm saying I want you to represent me. I want you  
6 to take -- there's inherent the power of that vote to give to  
7 this individual to represent me as a constituent of this  
8 region, of the state, and of this country. When you take  
9 away that, if I give you that power and your power is no  
10 good, it's a misnomer, Judge. There is no real power. There  
11 is no real vote. You're striking the vote. How about if  
12 legislation comes out from the national -- from the Congress  
13 and the Senate says -- in the Senate, Judge, and across this  
14 nation says each and every one of us have a right to vote.  
15 You can vote. Go ahead and vote whoever you want, but guess  
16 what? We're still going to control everything that we want  
17 to do, and we're going to place whoever we want to place in  
18 that thing. It's a misnomer, Judge. It insults the  
19 intelligence of the ordered society. It insults the  
20 intelligence of any democratic society. That's not the right  
21 to vote. That's not what vote was inherent, and --

22 THE COURT: How do you --

23 MR. AYAD: -- that's not what our framers of our  
24 Constitution envisioned, Judge.

25 THE COURT: How do you deal with the state's

1 argument that the people who made the decision to substitute  
2 the emergency manager for the mayor and the City Council, to  
3 the extent he did, were elected by the vote of the people?

4 MR. AYAD: Well, Judge, I would have to say -- let's  
5 talk about that a little bit.

6 THE COURT: Please.

7 MR. AYAD: In fact, that when you guys tried to  
8 shove this down our throat and not even put on the ballot, we  
9 have to actually fight you and go up to the Supreme Court on  
10 it, and the Supreme Court ruled in favor of the individuals  
11 to basically put it on that ballot, and it was put on the  
12 ballot. And guess what, Judge? The majority, the majority  
13 who, again, Judge, are not majority African American in the  
14 state, voted that they don't want the PA 436, but instead,  
15 Judge, what this basically state representatives did is  
16 shoved it down the people's throat, Judge,  
17 unconstitutionally. I would still have -- and I'll still  
18 have an argument in front of Judge Steeh, Judge --

19 THE COURT: Is there a constitutional right that  
20 people have to have their legislators only enact laws that  
21 the people agree with?

22 MR. AYAD: That's a very good question, Judge. It's  
23 going right to the heart of the argument. Not necessarily,  
24 Judge, but the people do have some kind of right, and that's  
25 called the constitution and the bill of rights and the First

1 Amendment rights and the fundamental rights, the right to  
2 vote, Judge, across this country, and that trumps all the  
3 legislations. If we look throughout history, Judge, the  
4 legislations have been overruled under certain bills and  
5 statutes and state statutes, and this is one of those types  
6 of situations where they will be overruled on this particular  
7 matter.

8 THE COURT: Right, but they've never been  
9 overruled --

10 MR. AYAD: That's what we think the likelihood of  
11 success is strong.

12 THE COURT: -- because there's evidence that the law  
13 was not supported by a majority of the people.

14 MR. AYAD: No. It was supported by the majority of  
15 the people, Judge. That's the thing. It was actually just  
16 voted by the --

17 THE COURT: No, no, no. My question is broader than  
18 that. No law has ever been held unconstitutional based on  
19 evidence that that law was not supported by a majority of  
20 people; right?

21 MR. AYAD: Maybe so, Judge, but the fact of the  
22 matter is I know, Judge, and I think we all could understand  
23 the importance of a fundamental -- of the most fundamental of  
24 rights. We're not talking about any kind of right, Judge.  
25 We're not talking about your ability to have a 30-day hearing

1 before a certain thing or relief. We're talking about the  
2 right to vote, Judge. What is this society -- what is the  
3 American society, the democratic society, without the ability  
4 to vote? You strip that away, Judge, I don't know what is  
5 more fundamental. I really don't know what's more  
6 fundamental.

7 THE COURT: Right, but to the extent that argument  
8 works as against PA 436 --

9 MR. AYAD: Correct.

10 THE COURT: -- the fact that the people supported or  
11 didn't support PA 436 is irrelevant, isn't it?

12 MR. AYAD: I think it is relevant, Judge, to a  
13 certain extent because the will of the people was not  
14 followed. That's one. But, second, Judge, will of the  
15 people are not -- it is a overall will of the Constitution of  
16 the United States. It was a strong component in all the will  
17 of the people, and that is the U.S. Constitution. The U.S.  
18 Constitution and the -- all the affirmants thereafter just  
19 says the individual should have the right. One vote, one  
20 person, Judge, under the Constitution, and that is so  
21 fundamental. People's lives -- wars were battled over these  
22 particular rights, and we shouldn't allow it to be stripped  
23 away by the simple PA 436. I would still be here arguing or  
24 I'd be arguing before Judge Steeh had the people not voted  
25 for a majority as to pass that particular legislation because

1 it draws on -- blocks off the minority.

2 THE COURT: Let's bring this back to the bankruptcy  
3 case.

4 MR. AYAD: Yes, I will do that, Judge. If I may,  
5 Judge, you know --

6 THE COURT: Well, let me focus you on this specific  
7 question, which you started to touch on, and so did Mr.  
8 Hollowell. Assume you win tomorrow in the District Court and  
9 you get the prospective relief that you seek.

10 MR. AYAD: Correct.

11 THE COURT: The emergency manager is out of office.  
12 The mayor and the City Council are back in. What's the  
13 impact of that on this bankruptcy?

14 MR. AYAD: And here it comes, and that's a very  
15 important question, Judge, and I agree with you. And we  
16 considered this, Judge, and we considered -- again, we were  
17 very careful, Judge. Our arguments are strictly the Voting  
18 Rights Act, the Constitutional fundamental right of the  
19 voting rights. What we're saying is, Judge, there is too  
20 many contingencies. There are too many ifs out there. Let  
21 me give you an example. First of all, if you lift the stay,  
22 we go back before Judge Steeh. Judge Steeh could rule that  
23 PA 436 is constitutional. That issue for a moment. Either  
24 way, party -- either party is going to appeal to the Sixth  
25 Circuit. We appeal to the Sixth Circuit. Whether we say

1 it's unconstitutional or constitutional, the Sixth Circuit  
2 can rule, another if that it's constitutional or  
3 unconstitutional. Then there may be a certiorari before the  
4 Supreme Court. Brother counsel is going to be arguing before  
5 the Supreme Court in a month -- less than a month from now,  
6 Judge, on the affirmative action situation, but we may go up  
7 to the Supreme -- then that argument, then it comes back  
8 down -- say the City Council or the mayor -- the mayor may  
9 say, you know, this is in the best interest -- again, another  
10 if and contingency, Judge, that the mayor may say I want this  
11 bankruptcy, not -- maybe the new City Council or the new  
12 mayor may say I want this bankruptcy.

13 Lastly, Judge, and this is very important and  
14 fundamental, Judge. We should not, Judge, base our rulings  
15 and our positions on such an important fundamental right. No  
16 right -- no bankruptcy rule should ever trump the right of an  
17 independent constituent of this nation to be able to vote for  
18 their local elections. That's a very dangerous, dangerous  
19 route. There is no more right more fundamental of all  
20 fundamental rights, Judge, as the right to vote, and the  
21 bankruptcy rules should not establish that.

22 Then lastly, Judge, I want to add, too, again, like  
23 we argued earlier, the judge -- again, we're asking for  
24 injunctive order, Judge. We're not saying, you know, apply  
25 it retroactively. We're not saying apply it a month ago or

1 two months ago. We're saying just rule that PA 436 is  
2 unconstitutional. That state judge, Judge Steeh -- that  
3 federal judge, Judge Steeh, can still rule proactively going  
4 forward that it's unconstitutional, but yet you are not to  
5 basically take away from what's already happened because  
6 we're too down in the line for it. And I heard yesterday  
7 they were leasing -- they've already leased the Belle Isle to  
8 the state, Judge. Again, we're not going backward, Judge.  
9 We're moving forward. We're not contesting the eligibility  
10 of the particular bankruptcy. We're saying if PA 436 is  
11 constitutional, absolutely, Judge. You know, the emergency  
12 manager is within his right basically to file for bankruptcy  
13 because the state statute gives him that powers and duties.  
14 We're not contesting that. Our argument, just like so many  
15 different of these arguments, you're not going to see one  
16 particular case in this Court, Judge, that has our particular  
17 arguments, and our arguments are very, very simple. We're  
18 not creditors. We're not debtors. We're not contractual.  
19 We're not asking for service or money damages. We're simply  
20 saying this is a fundamental constitutional civil rights  
21 issue as to the voting rights of these individuals in this  
22 state. That's it. We don't want nothing further, Judge, on  
23 that particular matter. And with all due respect to this  
24 Court, Judge, we feel that this is not the proper forum for  
25 this, not -- and I agree with your Honor on your previous

1 rulings. You've indicated that you could decide civil rights  
2 issues, and I agree with that. I'm not contesting that. But  
3 I challenge brother and sister counsels on this particular  
4 matter to show me a case where strictly -- only strictly  
5 constitutional issues were presented to a Bankruptcy Court as  
6 opposed to dual issues where there's a creditor or the City  
7 of Detroit is a defendant or debtor and there may be  
8 collateral constitutional issues. This is not the case.  
9 This is not the forum. This is not the situation here,  
10 Judge. We understand that sometimes judges, for instance, in  
11 a criminal case, may be called upon to rule on civil rights  
12 issues, you know, seizures and what have you, but this is not  
13 the case, Judge. This is strictly, strictly a constitutional  
14 civil rights issue to vote. We don't want nothing from the  
15 city. We haven't named the city. We haven't named the  
16 emergency manager. We don't want nothing from them, Judge,  
17 as to that.

18 THE COURT: All right. Let me ask you to wrap up,  
19 sir.

20 MR. AYAD: I'm sorry.

21 THE COURT: Let me ask you to wrap up, please.

22 MR. AYAD: All right, Judge. I will wrap up. And  
23 lastly, Judge, I would say where does an individual that has  
24 ongoing constitutional violations incurred such as the  
25 majority of African Americans in this state, Judge, where do



1 they go for relief? If we were to adopt their position, then  
2 they're saying basically we should come to the Bankruptcy  
3 Court to address our civil rights issues, Judge. Where do we  
4 go for -- where do we go for relief? Is there a petition?  
5 Is there a door that we can go knock on and say, "Give me my  
6 relief. I'm being violated"? If we were to adopt the  
7 opposing's position, Judge, what we would be saying is that  
8 if I was arrested as a resident of the City of Detroit and be  
9 put in jail the next day, I technically cannot even grieve  
10 the City of Detroit, what have you, because the City of  
11 Detroit has filed for bankruptcy. It's too broad. It's too  
12 overwhelming, Judge. It defies all notions of the --  
13 inherent in any democratic society and civil society, Judge,  
14 that we have an ability, an ability to ask for relief from  
15 when we are grieved, Judge. And here I don't see unless your  
16 Honor allows us to move forward before Judge Steeh and  
17 address those simple constitutional issues -- again, Judge,  
18 emergency manager, PA 436, that's only one of the powers he  
19 has is to file bankruptcy. He has many powers. He can sell,  
20 fire, discharge. He can -- you know, he can order supplies,  
21 toilet paper, whatever the case may be. These are just but  
22 one of the inherent powers that he has. We're not  
23 challenging those, Judge. What we're challenging is PA 436  
24 as being unconstitutional.

25 THE COURT: Let me hear from the city. Thank you.

1 MR. AYAD: Thank you, Judge.

2 THE COURT: Or the state.

3 MR. FUSCO: Good morning, your Honor. Timothy  
4 Fusco, Miller Canfield, on behalf of the City of Detroit.  
5 Your Honor, I'll be brief and try to focus on the bankruptcy  
6 issues that are presented by this motion.

7 First of all, as your Honor referenced in his  
8 questions to counsel, the NAACP was fully aware of the filing  
9 and on August 5th filed an appearance in the case. There's  
10 no question that the NAACP could have raised a constitutional  
11 objection, which, as your Honor determined in his opinion  
12 denying the motion for stay by the Retirees' Committee, is  
13 something justiciable before this Court if it relates to the  
14 question of eligibility.

15 The plaintiff devotes much of its brief and its  
16 reply to two issues that it seems to have abandoned today,  
17 first that this case was not contemplated by the extension  
18 order and that the extension order entered by your Honor did  
19 not deal with this case because it was not one of the  
20 enumerated cases. That issue was, as the plaintiffs note,  
21 brought before Judge Steeh, and he made a decision that the  
22 plain language of the stay order would apply to this lawsuit.  
23 I don't think that's --

24 THE COURT: I have to ask why the city didn't  
25 include this litigation in its motion to extend the stay.

1 MR. FUSCO: I asked the question myself, and I think  
2 the question at that point was just one of visibility at that  
3 point. It may have -- it just slipped under the radar. It  
4 certainly wasn't an intent to exclude this case from the  
5 ambit of the extension order. Second, the --

6 THE COURT: NAACP litigation in federal court didn't  
7 have visibility?

8 MR. FUSCO: Well, not as much visibility as a judge  
9 in Ingham County enjoining people and sending orders to the  
10 President, no, it didn't quite have that much visibility.

11 The second issue is this Court didn't have authority  
12 to enter the stay order. Again, that's nothing more than an  
13 attempt to relitigate the motion brought before this Court to  
14 obtain the extension. I think it's been decided, and for the  
15 same reasons that your Honor referenced in granting the  
16 relief initially, it's applicable here, but the real issue is  
17 the one --

18 THE COURT: Are there any other lawsuits out there  
19 that lack visibility?

20 MR. FUSCO: If they're not visible, then they  
21 probably don't, no.

22 THE COURT: That was a serious question.

23 MR. FUSCO: We're not aware --

24 THE COURT: Are there any other lawsuits out there  
25 that we should know about that are similar to this one?

1 MR. FUSCO: Well, there's a motion that's been filed  
2 in the Phillips matter. I don't know if that was referenced  
3 in the order or not. And we'll be dealing with that shortly.  
4 I'm not aware at this point of any other constitutional  
5 challenges, if that's what you're asking.

6 THE COURT: Well, let me just pin the question down.  
7 Are there any other lawsuits out there that are pending,  
8 federal court or state court, in which the city is going to  
9 contend that issues raised in them should be raised here in  
10 the context of eligibility?

11 MR. FUSCO: We're not aware of any right now. The  
12 state may be, your Honor, and that's a question you might  
13 want to pose to the state since the defendants in these cases  
14 have been --

15 THE COURT: Fair enough.

16 MR. FUSCO: -- state officers rather than the city.  
17 When you get to -- and the issue that you did ask counsel,  
18 which is isn't this really an eligibility objection, and the  
19 question was continually, I think, not answered, in Michigan  
20 we have one procedure for the filing of a Chapter 9 case,  
21 and, of course, as your Honor obviously knows, the  
22 municipality has to be authorized by the state in order to  
23 file. The only way you can file a Chapter 9 is through the  
24 appointment of an emergency manager, the emergency manager  
25 seeking authority from the governor, then the emergency

1 manager exercising his discretion or her discretion to file  
2 the case. The notion that if the plaintiffs prevail in  
3 having the EM law declared unconstitutional -- and what the  
4 plaintiff asked for in the complaint is not simply that but a  
5 preliminary and permanent injunction prohibiting any EM from  
6 exercising any authority and a preliminary and permanent  
7 order that actions exercised by the emergency manager under  
8 PA 436 are unenforceable. So at that point, your Honor, I  
9 think it's pretty clear we don't have the basis for a filing.  
10 We have no EM. We have no one else that can authorize a  
11 filing or continue with the case, so the notion that the  
12 mayor and council just suddenly slip into the place of the  
13 emergency manager is just not consistent with the statute.  
14 This is just as much an objection to eligibility as all the  
15 other constitutional objections that were filed and that are  
16 being heard by this Court.

17 THE COURT: Let's pin this down because I want to  
18 make sure I understand what you're saying. You're saying  
19 that if prospectively the emergency manager appointment is  
20 held unconstitutional and enjoined, that would have the  
21 impact or the result of, what, voiding this bankruptcy  
22 because under law only the emergency manager can pursue the  
23 bankruptcy?

24 MR. FUSCO: Yes. And I think if you asked him --

25 THE COURT: Is that what the emergency manager law

1 says --

2 MR. FUSCO: No.

3 THE COURT: -- or does it say that only an emergency  
4 manager can file a bankruptcy case?

5 MR. FUSCO: It says only an emergency manager can  
6 file the case, but we have --

7 THE COURT: Well, that's been done, and if the NAACP  
8 is not seeking to avoid that act, what's the problem?

9 MR. FUSCO: Well, the problem is the NAACP also asks  
10 that all the actions taken by the emergency manager are  
11 unenforceable.

12 THE COURT: Well, all right. Assume for a minute  
13 there's been a retraction of that and all they seek is  
14 prospective relief.

15 MR. FUSCO: Well, then I think we have the  
16 interference with the bankruptcy case that your Honor is so  
17 concerned about and why you've tried to consolidate --  
18 arduously tried to consolidate all of the possible issues  
19 affecting the bankruptcy case before this Court. You have at  
20 that point a great deal of uncertainty. Who decides that  
21 issue? If it stays with Judge Steeh, is it he? Does the  
22 issue come back here? We're trying right now. In fact, Ms.  
23 Lennox is down right now in mediation trying to reach  
24 agreements with creditors, and if this case and others like  
25 it are allowed to proceed in different forums, we have the

1 risk of inconsistent results. We have the result of  
2 uncertainty. It's going to have a significantly deleterious  
3 effect to this case and how it -- and how it proceeds. And,  
4 your Honor, we're not depriving -- we're not depriving the  
5 plaintiff of the right to assert these claims. As your Honor  
6 noted, you said, "Well, what if I allow you to file a late  
7 objection to eligibility?" And the NAACP wasn't interested  
8 in that, but why not? File that and have it heard here.  
9 Your Honor has already determined you have jurisdiction to  
10 hear that.

11 THE COURT: Right. The answer to that that I heard  
12 was their case isn't only about Detroit.

13 MR. FUSCO: Um-hmm.

14 THE COURT: There are, what, eight other entities --

15 MR. FUSCO: There are.

16 THE COURT: -- that have these emergency managers.  
17 Where does the NAACP go to bring its claim as to them?

18 MR. FUSCO: Why wouldn't the result here have the  
19 same effect on those as it does on Detroit? If your Honor  
20 determines --

21 THE COURT: Didn't understand that answer.

22 MR. FUSCO: If your Honor determines that PA 436 is,  
23 indeed, unconstitutional, why wouldn't that have -- be  
24 dispositive of the emergency managers in those other  
25 jurisdictions as well? Same statute; same issues. It's no

1 different than if Judge Steeh sitting in Detroit says, "Well,  
2 yes, I'm going to declare it invalid." Presumably that would  
3 affect all of them. You're hearing the same issue.

4 THE COURT: Well, but isn't it the difference that  
5 in this case I can only hear from people who have an interest  
6 in the outcome of this case, which would not include the  
7 residents of Pontiac, Flint, Benton Harbor, the other  
8 jurisdictions that have emergency managers? There's a  
9 process question here.

10 MR. FUSCO: Well, except none of those people are  
11 involved in this lawsuit now. They have not claimed --

12 THE COURT: Well, all right. I asked that question,  
13 didn't I, and the answer I got was that the state NAACP  
14 represents --

15 MR. FUSCO: And that party is here.

16 THE COURT: -- across the state.

17 MR. FUSCO: And that party is here, and that party  
18 can well participate in this case raising the eligibility  
19 objection and make the same exact arguments. It's a question  
20 right now of forum and whether you're going to be able to do  
21 what you've tried so hard to do, which is centralize all of  
22 these issues before this Court. I mean I'd, indeed, argue  
23 that you're going to get a faster result here than you  
24 would -- than you would in front of -- in front of Judge  
25 Steeh, so I see -- and when you balance it, if you leave the



1 stay in place right now and the NAACP elects not to file an  
2 eligibility objection, once the stay is terminated either  
3 because you could, "A," say the city is not eligible -- and  
4 we all agree in that case that the matter may go forward --  
5 or plan of adjustment is confirmed, and the stay goes away.  
6 You can still proceed with the case. This is no different  
7 than any other matter in which we're simply delaying. Now,  
8 it's even better than the tort case.

9 THE COURT: You wouldn't have any objection if the  
10 NAACP filed a second lawsuit seeking relief on the emergency  
11 manager law in all of the other municipal entities other than  
12 Detroit?

13 MR. FUSCO: I think what you're asking is what  
14 happens if the NAACP files a brand new lawsuit. It may have  
15 to procedurally dismiss this one before it does that, but it  
16 files an action in Flint or even better in the Western  
17 District for Benton Harbor.

18 THE COURT: Doesn't matter where it files.

19 MR. FUSCO: And it files a suit alleging the same  
20 claims and saying the emergency manager in Benton Harbor is  
21 unconstitutional. If your first question is do we think the  
22 stay would apply to that, the answer is yes.

23 THE COURT: You do?

24 MR. FUSCO: We do, um-hmm. Now, but what would  
25 happen --

1 THE COURT: What are the grounds for that?

2 MR. FUSCO: Well, why is it any different than any  
3 of the other actions? The outcome in that case would have a  
4 direct result and effect on this bankruptcy.

5 THE COURT: Why is that?

6 MR. FUSCO: Because that's the decision that your  
7 Honor made when you extended the stay. It's going to be a  
8 suit against state officers involving a matter that could  
9 adversely affect the bankruptcy case.

10 THE COURT: And that's the question I'm asking.  
11 What's the adverse effect if another judge somewhere holds  
12 that the appointment of an emergency manager in Benton  
13 Harbor -- and, of course, we don't mean to pick on Benton  
14 Harbor -- is unconstitutional? What's the effect on this  
15 case?

16 MR. FUSCO: Well, it's the same effect as if the  
17 plaintiffs prevail in this case.

18 THE COURT: What is the effect?

19 MR. FUSCO: The effect is if the Court rules it's --  
20 PA 436 is unconstitutional and we don't have an emergency  
21 manager statute, then it's our position there's no procedure  
22 for the filing of a bankruptcy case.

23 THE COURT: Well, but that ruling is binding only on  
24 the parties in that case.

25 MR. FUSCO: Well, if it's in the Eastern District,

1 it presumably would be binding on your Honor, but I know the  
2 District Court, Bankruptcy Court issue, but we can still have  
3 the --

4 THE COURT: For the record --

5 MR. FUSCO: Yes.

6 THE COURT: -- the Bankruptcy Court is not bound by  
7 decisions of the --

8 MR. FUSCO: I know.

9 THE COURT: -- District Court except as they are on  
10 appeal in the case.

11 MR. FUSCO: Or the law of the case. That's correct.  
12 That's correct. But think about the effect on the bankruptcy  
13 itself, and we're talking right now -- let's look at where we  
14 are in the status in this case. We're very early in both  
15 cases. We're early in the case before Judge Steeh, and we're  
16 early in the case here. There's been no determination of  
17 eligibility, and there's been nothing in the District Court  
18 case other than cross -- motion to dismiss and a response  
19 filed to a motion to dismiss. Now, you're moving this case  
20 forward at an accelerated pace, one that is faster than any  
21 other Chapter 9 that I've seen. We have not even had a  
22 determination of eligibility. You're trying to create an  
23 atmosphere where parties are negotiating and endeavoring to  
24 reach a consensual plan of adjustment, which obviously is  
25 what's in the best interest of everybody in this case.

1 Putting this case on hold -- and, indeed, the NAACP --

2 THE COURT: I don't think that's so obvious to the  
3 NAACP.

4 MR. FUSCO: Well, it alluded to that in its reply  
5 where --

6 THE COURT: I think what it thinks is in the best  
7 interest of the case is to have the elected mayor and City  
8 Council be the one who do that negotiation.

9 MR. FUSCO: Um-hmm. And there's absolutely no  
10 certainty that's what's going to happen. In fact, I would  
11 argue that I think it's highly likely that's not what's going  
12 to happen. And the next -- the first thing you're going to  
13 see after that ruling is a motion to dismiss this case.

14 THE COURT: I was only challenging your assertion  
15 that it's obvious that the mediation is in the best interest  
16 of everyone. I'm not sure everyone would share that view.

17 MR. FUSCO: Well, consensual resolution --

18 THE COURT: I agree with you. That's why I ordered  
19 mediation, but --

20 MR. FUSCO: Yes.

21 THE COURT: -- not everyone agrees with that.

22 MR. FUSCO: And one result that might be appropriate  
23 here is to continue the stay at this point, and if you  
24 determine the city is eligible, we can revisit it.

25 THE COURT: Revisit what?

1 MR. FUSCO: The stay motion and file another motion,  
2 or we can revisit that. My point is at this point in both  
3 cases, it's early.

4 THE COURT: Why would your position be any different  
5 after eligibility than it is now?

6 MR. FUSCO: I don't know what the --

7 THE COURT: Argue the same deleterious effect if the  
8 mayor came in with the City Council in this case in place of  
9 the emergency manager.

10 MR. FUSCO: We'd have a much better idea where the  
11 case is going, I think, at that point.

12 THE COURT: Well, the same is true after plan  
13 confirmation, too, assuming there's --

14 MR. FUSCO: Yes.

15 THE COURT: -- confirmation. All right. Anything  
16 further?

17 MR. FUSCO: No.

18 MR. HOLLOWELL: Briefly, Judge --

19 THE COURT: One second. You represent the state;  
20 right?

21 MS. GRIMM: I do, your Honor. Good morning.

22 THE COURT: All right. So we're going to hear from  
23 the state, and then we'll get back to you.

24 MR. HOLLOWELL: Thank you.

25 MS. GRIMM: For the record, Assistant Attorney

1 General Nicole Grimm appearing on behalf of the State of  
2 Michigan. I would simply reiterate most of what the city  
3 said. Our position, I think, is laid out in the briefing  
4 before this Court. I would want to emphasize that it was  
5 stated in the beginning repeatedly that this is about voting  
6 rights and not debtor creditor, but, again, the relief sought  
7 in the second amended complaint -- or I'm sorry -- the first  
8 amended complaint would absolutely eviscerate Detroit's  
9 bankruptcy filing, and as counsel for the city made clear,  
10 that -- having an emergency manager file for bankruptcy is  
11 the only way for that filing to happen, so it's difficult to  
12 discern how either this Court did not have discretion in the  
13 first instance, which I think petitioners imply, at least in  
14 their first pleading before this Court, or how now the stay  
15 cannot be extended to include this case when it is, I think,  
16 axiomatically related to the bankruptcy proceeding.

17 THE COURT: Well, is it the attorney general's  
18 reading of PA 436 that only an emergency manager can  
19 prosecute the Chapter 9 case once having filed it?

20 MS. GRIMM: I would agree with the Court that as far  
21 as I know --

22 THE COURT: It's only a question. There's  
23 nothing --

24 MS. GRIMM: Right.

25 THE COURT: -- to agree with or disagree with.

1 MS. GRIMM: Okay. Well --

2 THE COURT: Just a question. What's the attorney  
3 general's reading?

4 MS. GRIMM: As far as I know, the emergency manager  
5 law states only that the emergency manager is the one that  
6 has to file it.

7 THE COURT: Um-hmm.

8 MS. GRIMM: In terms of prosecution, though, I think  
9 that if a law is ruled unconstitutional, then all of the  
10 actions taken under that law are null and void, and that's  
11 certainly the relief sought in the petitioner's lawsuit.

12 THE COURT: It's a complex question, but if I heard  
13 counsel for the NAACP correctly, they're only seeking  
14 prospective relief.

15 MS. GRIMM: Right. And that's something new.  
16 That's new today and not appearing in any papers that have  
17 been filed, but, again, I would --

18 THE COURT: That solve the problem?

19 MS. GRIMM: Well, I would question whether that is  
20 actually something that's possible because they are not  
21 backing off from seeking a declaration that PA 436 is  
22 unconstitutional. If it's unconstitutional now, then I  
23 believe, as a matter of law, necessarily, actions taken under  
24 it would also have been unconstitutional and void, and that  
25 would include the filing for bankruptcy.

1 THE COURT: Well --

2 MS. GRIMM: That's my understanding.

3 THE COURT: Do you remember the case of the attorney  
4 who came before the Court seeking relief from the stay so he  
5 could get his attorney fees because the state judge had found  
6 the Open Meetings Act violation?

7 MS. GRIMM: Yes.

8 THE COURT: Davis.

9 MS. GRIMM: Yes. I'm familiar with that case.

10 THE COURT: Thank you, staff.

11 MS. GRIMM: Yes.

12 THE COURT: Okay. So he had all this law, right,  
13 which said that, you know, even if it's -- even if the  
14 appointment is found to be illegal, the actions taken in the  
15 meantime are still valid. He had all that law.

16 MS. GRIMM: Okay.

17 THE COURT: Doesn't all that law save whatever Mr.  
18 Orr has done in the meantime and especially given the  
19 representation made on the record here today?

20 MS. GRIMM: Can I just ask just which representation  
21 the Court is referring to? The representation that only --

22 THE COURT: The representation that the relief they  
23 seek is only prospective, yes, that.

24 MS. GRIMM: I don't know if I can speak definitively  
25 to that.



1 THE COURT: Okay.

2 MS. GRIMM: My reading would be I'm not very sure  
3 that you could --

4 THE COURT: You're concerned. Okay.

5 MS. GRIMM: Yeah. I am concerned about that. Other  
6 than that, I think at least what petitioners have stated in  
7 their papers is that they're seeking to invalidate Kevyn  
8 Orr's appointment and everything he's done pursuant to it,  
9 and we would adopt the city's position as well.

10 THE COURT: Okay.

11 MS. GRIMM: Thank you.

12 THE COURT: Thank you. All right. For rebuttal,  
13 I'm going to ask one or the other of you to speak.

14 MR. HOLLOWELL: That's fine, Judge.

15 THE COURT: Take your choice.

16 MR. HOLLOWELL: Thank you. Wrap it up, Judge.  
17 Again, Melvin Hollowell on behalf of the NAACP. So as it  
18 relates to the Court's inquiry, the federalism republican  
19 form of democracy question about the legislature also being  
20 elected and how does that work as it relates to a vote of the  
21 people, well, that was actually addressed by the Sixth  
22 Circuit in the League of Women Voters versus Brunner case,  
23 which we cited in our brief today, 458 F.3d 16.

24 THE COURT: What did they say?

25 MR. HOLLOWELL: And they said it's part of the

1 inquiry to determine whether or not the statute is  
2 unconstitutional. That is part of a several-prong test.

3 THE COURT: Um-hmm.

4 MR. HOLLOWELL: Was there a vote of the people? And  
5 they look at were there ordinances in place, you know, were  
6 those ordinances voted on by the people, were there state  
7 referenda, were there -- so that is actually part of what the  
8 Sixth Circuit says you have to look at.

9 THE COURT: Um-hmm.

10 MR. HOLLOWELL: So it's part of the case. The  
11 second thing is I would refer the Court to our complaint and  
12 Section 61 through 66 very specifically where we outline the  
13 jurisdictions outside of the City of Detroit.

14 THE COURT: Right.

15 MR. HOLLOWELL: And, third, as it relates to  
16 counsel's I think condescending comment that the NAACP's case  
17 lacked visibility, it was a nationally -- I think it was  
18 pretty condescending. We're a hundred-year-old organization.  
19 It was authorized by the national NAACP. U.S. Labor  
20 Secretary Robert Reich weighed in.

21 THE COURT: You heard me --

22 MR. HOLLOWELL: I did.

23 THE COURT: -- express similar skepticism --

24 MR. HOLLOWELL: I did.

25 THE COURT: -- about that response --

1 MR. HOLLOWELL: Incredibly condescending.

2 THE COURT: -- so I think we can just let it go at  
3 that.

4 MR. HOLLOWELL: Yeah. We'll let it go at that. And  
5 then as it relates to prospective -- certainly not obvious to  
6 us that mediation is the best. The best for us is democratic  
7 rule, and the Court focused in like a laser beam on what we  
8 saw as well, is that Public Act 436 is silent with respect to  
9 moving forward. It only talks about filing, but it doesn't  
10 say, okay, after filing, and so we're saying we'll sign an  
11 order. We will sign an order saying that we are going to  
12 contest anything prior to today or whenever the Court rules  
13 relative to --

14 THE COURT: No. If you win your lawsuit before  
15 Judge Steeh, if that goes ahead, your next step won't be to  
16 come into this Court and file a motion to dismiss on the  
17 grounds that the filing was unconstitutional.

18 MR. HOLLOWELL: That's exactly right, and we would  
19 sign an order to that effect, Judge. And, you know, by the  
20 same token, you know, in Pontiac they sold the Silverdome to  
21 some folks in Canada. We're not saying go find those folks  
22 in Toronto and return the Silverdome back. The relief is  
23 prospective, and so, again, as we've said before, not name  
24 the city, there's no debtor creditor issues. This is purely  
25 a voting rights issue. And for the reasons stated on the

1 record, we would ask that the stay -- that we have an  
2 exception to the extension of the stay.

3 Is it okay if he just says what he was going to say  
4 to me in my ear?

5 THE COURT: Okay.

6 MR. AYAD: Just to give credence that this is not  
7 new information, Judge, we indicated on Docket Number 29 and  
8 35 in our response to the motion to dismiss before Judge  
9 Steeh one of the options is bankruptcy. We've never ruled  
10 that out. In fact, after we said that, two weeks later they  
11 filed for bankruptcy, Judge, so that was something that was  
12 contemplated.

13 MR. HOLLOWELL: Thank you, Judge.

14 THE COURT: All right. Everybody all set?

15 MS. GRIMM: Your Honor, if I may briefly point out  
16 something about the Emergency Manager Act? It does actually  
17 say -- in MCL 141.1558, Section 18, it says that the  
18 emergency manager is the only one empowered to act  
19 exclusively on the local government's behalf in any such case  
20 under Chapter 9, so it is not only the filing of the  
21 bankruptcy but also the prosecution of it.

22 THE COURT: All right. All right. The Court will  
23 take this under advisement and issue a written decision. I  
24 think that's it for our docket today, so we will be in  
25 recess --

1 THE CLERK: All rise.

2 THE COURT: -- until one o'clock.

3 THE CLERK: Court is in recess.

4 (Recess at 11:54 a.m., until 1:10 p.m.)

5 THE CLERK: Court is in session. Please be seated.

6 Recalling Case Number 13-53846, City of Detroit, Michigan.

7 THE COURT: The record should reflect counsel are  
8 here. My apologies to you, counsel, for being a few minutes  
9 late here, and I need another minute to get organized here.  
10 Okay.

11 On September 24, 2013, AFSCME filed a motion for  
12 entry of an order modifying the automatic stay solely to  
13 allow administrative law judge to execute his opinion and  
14 liquidate damage award before he retires on October 4, 2013.  
15 It also requested an expedited hearing on this matter, which  
16 the Court granted and set for hearing today. In the  
17 meantime, the City of Detroit did file an objection to the  
18 motion and a brief.

19 AFSCME asserts that the matter before the Michigan  
20 Employment Relations Commission, MERC, has been fully  
21 briefed, and, in fact, the administrative law judge, ALJ,  
22 is -- has already given an oral opinion in the matter. The  
23 record also reflects that prior to the bankruptcy petition,  
24 the parties submitted supplemental briefs to the ALJ  
25 regarding the appropriate remedy and other matters.

1 Therefore, AFSCME asserts that all that remains for the ALJ  
 2 to do is to issue a written opinion. It asserts that  
 3 allowing the ALJ to issue a written opinion will simply  
 4 create a snapshot of the ALJ's recommendation. It further  
 5 asserts that this modification of the automatic stay will not  
 6 prejudice the city or drain city resources or distract the  
 7 city from the pending Chapter 9 proceedings before the  
 8 Bankruptcy Court because there is nothing for it left to do  
 9 in the litigation before the ALJ.

10 A decision whether or not to lift the automatic stay  
 11 resides within the sound discretion of the Bankruptcy Court.  
 12 In re. Garzoni, 35 Federal Appendix 179, 181, Sixth Circuit,  
 13 2002, citing Laguna Associates Partnership v. Aetna Casualty  
 14 & Insurance Company, In re. Laguna Associates Limited  
 15 Partnership, 30 F.3d 734, 737, Sixth Circuit, 1994. The  
 16 Garzoni court stated on the same page, quote, "Bankruptcy  
 17 Code Section 362(d)(1) provides that the bankruptcy court may  
 18 grant relief from the automatic stay for cause. See 11  
 19 U.S.C., Section 362(d)(1). The bankruptcy court considers  
 20 the following factors in deciding whether to lift a stay:  
 21 (1) judicial economy; (2) trial readiness; (3) resolution of  
 22 preliminary bankruptcy issues; (4) the creditor's chance of  
 23 success on the merits; and (5) the cost of defense or other  
 24 potential burden to the bankruptcy estate and the impact of  
 25 the litigation on other creditors." Bankruptcy courts have

1 held that it may be appropriate to lift the automatic stay  
2 when another court, quote, "already had all of the  
3 documentation and evidence in its hands in order to rule in  
4 the matter and a decision could be made almost immediately,"  
5 close quote, In re. Bunting, 2013 Westlaw 153309, Eastern  
6 District of Michigan, January 15th, 2013.

7 After reviewing all of these factors, the Court  
8 concludes that they weigh in favor of modifying the automatic  
9 stay to allow entry of the ALJ's written opinion. In the  
10 Court's view, the most important matter -- or factor is that  
11 it does not appear that there will be any prejudice to the  
12 city if the relief sought by the moving party, AFSCME, is  
13 granted and if all we allow is for the ALJ to issue a written  
14 decision.

15 In particular, AFSCME's proposed order only seeks to  
16 allow the ALJ to execute his recommended decision before he  
17 retires on October 4th, 2013. In this regard, the Court must  
18 state for the record that the fact that the ALJ -- the ALJ's  
19 retirement is imminent is, in the Court's view, largely  
20 irrelevant. The Court should decide whether it's appropriate  
21 to grant this limited relief from the stay regardless of  
22 whether the ALJ happens to be retiring imminently or not.  
23 The Court notes that the proposed order also waives the stay  
24 of the order as provided for in Bankruptcy Rule 4001(a)(3),  
25 and that's appropriate here as well.

1           The Court does acknowledge and recognize that the  
2 city takes the position that there is much more process that  
3 is required before the ALJ and also before MERC before this  
4 matter is finalized. The Court concludes, however, that it  
5 is not for this Court to decide whether the ALJ has completed  
6 all of the process necessary for him to issue a decision.  
7 It's for the ALJ to decide. And, of course, in that regard,  
8 if the city determines that its procedural or substantive  
9 rights have been prejudiced by any action of the ALJ that  
10 flows from or results from this order or otherwise, those  
11 objections are, of course, fully preserved to be presented as  
12 appropriate in future proceedings.

13           Accordingly, the Court does grant relief from the  
14 automatic stay but only until 11:59 p.m. on October 4th,  
15 2013, for the sole purpose of allowing the administrative law  
16 judge to -- the opportunity to issue a written recommendation  
17 should he decide that it is appropriate to do so. This  
18 relief that the Bankruptcy Court is granting is neither a  
19 request for the ALJ to issue a recommendation or an order to  
20 do so. And just to be crystal clear about this, if the ALJ  
21 feels that more process is required for any reason, whether  
22 it's the arguments made in the post-hearing briefs or the  
23 events that have occurred post-hearing, relief from stay is  
24 not granted to allow for any other or further process or  
25 procedures.



1           The parties have agreed on the record and the Court  
2 does order that all dates and deadlines that would otherwise  
3 flow under state law from any opinion or recommendation that  
4 the ALJ issues are tolled and will be tolled indefinitely  
5 pending a further order of this Court.

6           Finally, the Court feels compelled to state on the  
7 record that it has taken the time to articulate on the record  
8 here this very narrow ruling so that it is clear that this  
9 case should not be considered precedent for other parties'  
10 motions for relief from the stay because the facts and  
11 circumstances here are unusual or unique, to say the least.  
12 The Court will prepare an appropriate order. Anything  
13 further?

14           MS. LEVINE: Thank you.

15           MS. LENNOX: No, your Honor. Thank you.

16           THE COURT: All right. We'll be in recess then.

17           THE CLERK: All rise. Court is adjourned.

18           (Proceedings concluded at 1:20 p.m.)

## INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

October 8, 2013

\_\_\_\_\_  
Lois Garrett